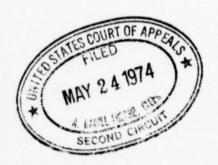
United States Court of Appeals for the Second Circuit



EXHIBITS

Fyhibit in U.S. ex rel. Sebastian
Rossilli v. LaVallee, 74-1273

State Court Transcript of Sebastian Rossilli, Indictment No. 20991 Vol. II



To be returned to:

Margery Evans Reifler

N.Y.S. Attorney General's

Office

(212) 488-7590

```
I had -- well, world history at that time.
                    World history. What other courses did you
      take at this point?
                    Speech, and that was -- my world history and
      algebra course.
             Q
                    Algebra?
             A
                   First year algebra.
  9
                  And do you remember what day of the week
             Q
 10
     January 11th was?
 11
                   No, I don't, sir.
            A
 12
                   You don't? Do you know what day of the
            Q
13
     week February 1st was?
14
                   It was a week day. That's all I can tell you
15
16
                   Do you remember what you got in algebra I in
            Q
17
     school?
18
                   Yes, I failed it.
            A
19
                   But you remember this was a maroon car, cor-
            Q
20
     rect?
21
            A
                   Yes, sir.
22
23
                   Now you claim you had two other friends
            Q.
    with you at this point, is that correct?
24
25
                   Yes.
```

Q	They were with you?
A	Yes.
Q	And you saw three men running at you?
٨	Yes.
Q	Is that right?
A	Yes.
Q	Were they running at you together or in a
file?	
A	Single line.
Q	One was following the other, correct?
A	More or less.
Q	They weren't all coming at you three at a
abreast	, were they?
A	Right.
Q	One after the other like in an Indian file,
A	Right.
Q	Were they running fast or slow, or in a mild
A	It was a quick pace they were running.
Q	Now the first man that came at you, what
look 11	
	A Q A Q file? A Q abreast A Q A

```
A
                     He was a heavy set man.
                     Did he have a hat on?
              Q
                     I really don't remember.
              A
                    You don't remember him but he was the one
             Q
      you saw first, correct?
                    Yes.
  7
  8
                    That was the first man and you don't remem-
             Q
  9
      ber whether he had a hat on. What color coat did he have
 10
      on?
 11
                    I believe it was a long coat, gray coat.
             A
12
                   Long gray coat. Could you see the third
             Q
13
      man clearly over the first and second men?
14
                    When they turned the corner, yes.
             A
15
16
             Q
                    What did the second man have on?
17
                    It was, I imagine just above the knee. It
18
     was a black coat.
19
            Q
                   Did he have a hat on?
20
                  To my recollection, no.
            A
21
                   He didn't have a hat on. When you say to
22
     your recollection, isn't this all to your recollection?
23
24
                   Yes, sir.
            A
25
                   Now the third man, what did he have on?
            Q
```

	A I believe it was a gray coat, too.
:	
	3
4	A I don't remember.
5	
6	young man who testified here today, Mr. Barto, stated
7	that the three men were running abreast toward you, would
8	
9	MR. DOOLITTLE: Objection to the form
10	of the question. I don't think it's proper to
11	
12	incorporate in a question of this witness the
13	statement of any other witness to impeach this
14	witness' or the other witness' credibility. I
15	think that's erroneous.
16	THE COURT: I'll allow it.
17	Q Would you say that your recollection is
18	correct, or the recollection of Mr. Barto?
19	
20	MR. DOOLITTLE: Objection, your Honor.
21	THE COURT: I'll sustain the objection.
22	Q Would that refresh your recollection?
23	A No, sir.
24	Q You would still maintain they were running in
25	single file?

```
1
                    Yes, sir.
  2
                    Now let's go to the first man coming at you
      in single file. How would you describe him?
                    He was a man, I'd say about six foot, maybe
      a little more. He was heavy set man. Not heavy, he had
      a heavy build, but he was like overweight, more or less.
                    And did he have a hat on?
             Q
             A
                    No, not that I remember.
 10
                   Not that you remember. Was he carrying
             0
 21
     anything?
 12
            A
                   Not that I remember.
13
            Q
                   Now the second man, can you describe him?
14
                   He was shorter, noticeably shorter than the
15
     other two, and he was wearing a black coat.
16
17
                   And was he carrying anything?
            Q
18
                   Not that I remember.
            A
19
                   And did he have any distinguishing marks
            Q
20
    that you remembered?
21
           A
                  None.
22
                  And the third man, what was he dressed like?
           Q
23
                  He had a gray coat on.
24
           A
25
                  Did he have a hat on?
           Q
```

1	A	Not that I remember.
2	Q	Was he carrying anything?
3	A	Not that I remember.
5	* Q	And did you give all of this description to
6	Detective Al	tomare on that day?
7	A	Yes.
8	Q	
9		And did you tell the detective anything
	further about	t that?
10		THE WITNESS: About what? The inci-
11	dent?	
12	40	
13		MR. WEINBERG: Yes.
14	A	We described how it happened, you know, how
15	we came about	seeing it and just what happened.
16	Q	How did you come about seeing it?
17	A	
18		I was walking down the street with two
19	other friends	towards going east on that road and we
	were just wal	king in the middle of the street.
20		
21	Q	Did you see any other persons in the middle
22	of the street	at that point?
23	A	No, not hear them.
24	Q	Did you see a woman in the street?
25	A	No.

```
1
                    Did you see any other men in the street at
              Q
       this point?
                    Further down the street there were other men.
             Q
                    There were other men. Did you notice what
      they looked like?
                    No, they were a good three-quarters of a
      block more away.
                  By the way, did you hear any gun shots?
             Q
 10
                 At the time they asked me--
             A
 11
                   I ask you if you heard any?
            Q
 12
                   Yes, I did.
            A
 13
                   You heard gun shots?
            Q
 14
 15
                   Yes.
16
                   When did you hear the gun shots? Was it
            Q
17 before the men started coming at you or after?
18
                 It was before.
19
           Q
                 How long before?
20
           A
                  I'd say a good minute, maybe two.
21
           Q
                 You heard gun shots two minutes beforehand?
22
23
                  Yes.
24
           Q
                  Did you look in the direction from where the
25
    gun shots were coming?
```

. 1		. A	No.
2		Q	How many shots did you hear?
3		A	I only heard one.
4		Q	You were in the police station, you say,
5	where	you sa	y you saw this man in a line up, is that
6	correc		, you can this man in a line up, is that
	00116		
8		A	Yes, sir.
9		Q	How many other men were in the line up?
10		A	There was three other men and that man.
11	There	was fou	r altogether.
12		Q	What did those men look like? Will you des-
14	cribe	each on	me of them to me?
15		A	
16	Aleven		They were all ranging about from five foot
17	CICACU		ut six foot one; just about that.
18		Q	None of them were as short as this man, is
19	that c	orrect?	
20		A	They were not much bigger.
21		Q	Not much bigger?
22		A	No.
23		Q	You would say that they were from five foot
4	eleven	inches	up, is that correct?
5			
		A	Somewhere around there.

		전 BEST BEST NOTE NOTE NOTE NOTE NOTE NOTE NOTE NOT
1	Q	How tall do you think this defendant is?
2	A	Five foot nine.
3	Q	Did the detective help you in identifying
4 5	this defenda	
6	A	No, sir.
7	Q	
8		Now on February 1, 1965 you saw this defend-
	and in the i	ine up, is that correct?
9	A	I believe that was the day.
10	Q	You don't know what day of the week it was.
11	Do you remem	ber whether it was at night?
12		
13	A	No, it was in the afternoon.
14	Q	And how did you come to go there to see this
15	line up?	
16	A	Well, I was notified at school that they
17	wanted us to	go up and identify somebody.
18		
19	. Q	Are you positive as you sit here now that
20	this is the	defendant? That this is the man that came
21	running down	that street on January 11, 1965?
22	A	Yes.
23	Q	You are?
24	A	Yes.
25	Q	And you are also positive that they came

1	running down	n towards you in single file, is that correct?
2	A,	Yes, sir.
3	Q	And you're also positive that you don't
4 5		nether people were wearing hats or weren't
6		on that day, is that correct?
7	A	That's right, sir.
8	Q	Did you have a discussion with the detective
9		ray in the last hour or so with regard to your
10		Just yes or no.
11		
12		Yes.
13	Q	Did you have a discussion with Mr. Brian
14	Barto in the	last hour with regard to your testimony here?
15	A	No, sir.
16	Q	You didn't?
17	A	No.
18	Q	You didn't talk to Mr. Barto at all?
19	A	
20		I talked, but it wasn't about my testimony.
21	Q	Was it about his testimony?
22	A	Yes, I asked what they asked.
23	Q	What did he say they asked?
24	A	He said they just asked a few questions
25	about, you kn	now, the day it happened and stuff like that.

1	Q	Did he tell you what he testified to here?
2	A	No.
3	Q	He didn't at all?
4		
5	A	No.
6	Q	Just questions that were asked and no answers
7	A	Right.
8		MR. WEINBERG: No further questions.
9	REDIRECT EXA	
10	BY MR. DOOLT	TTLE:
11		
12	Q	You say you talked to Detective Altomare
13	out in the h	all?
14	A	Yes, sir.
15	Q	Did he ever tellyou what to testify to?
16	A	No, sir.
17	Q	Did he ever tell you to say anything other
18	than the tru	B MANGAN THE STORE HE STORE H
19	onan the tru	
20	A	No, sir.
21	Q	You talked to me too, didn't you, John?
22	A	Yes, sir.
23	Q	You talked to me in my office?
24	A	Yes.
25	Q	Did I tell you to tell the truth?

1	A Yes.
2	Q Have you told the truth?
3	A Yes, sir.
4	
5	MR. DOOLITTLE: No further questions.
6	Thank you, Judge.
7	THE COURT: You may step down, Mr.
8	Swift. Thank you.
9	(The witness was excused.)
10	MR. DOOLITTLE: I've just run out of
11	witnesses. We've been going so fast. I possibly
12	
13	have a few more witnesses I might have on tap for
14	tomorrow and, as the matter of alibi which has been
15	raised by the defendant I think the Court is going
16	to give me some time to work on that. I haven't
17	had any time at this point, as the Court is aware
18	THE COURT: All right. We'll recess then
19	until tomorrow morning at 9:40. Is that a con-
20	venient time?
21	
22	MR. WEINBERG: 9:40 isI was going to
23	ask for the additional ten minutes.
24	THE COURT: I misunderstood. I thought
25	you would be able to

1	MR. WEINBERG: 9:40 is perfect, your
2	Honor.
3	THE COURT: All right. Gentlemen of
5	the jury, we'll recess until 9:40 tomorrow morning.
6	Please don't discuss the case among yourselves or
7	with anyone else. Please don't form any opinion
. 8	or express any opinion about the case until it is
9	finally submitted to you. Good afternoon. I'll
10	see you tomorrow morning.
11	MR. DOOLITTLE: Judge, before you
13	leave, I'd like to put something on the record
14	here. I'd like to state for the record that Mr.
15	Weinberg requested from me the grand jury minutes
16	of Mr. William Brown, pages 21 through 24, and I
17	gave them to him. I'm not going to have them
18	marked for identification. They were returned.
19	MR. WEINBERG: Just as these are re-
20	turned.
22	THE COURT: All right. Good afternoon,
23	gentlemen.
24	(Whereupon, the trial was adjourned to
25	January 19, 1965 at 9:40 A.M.)

COUNTY COURT : NASSAU COUNTY

PART IV

THE PEOPLE OF THE STATE OF NEW YORK :

-against-

SEBASTIAN ROSSILLI,

: Ind. No. 20991

Defendant.

Mineola, New York January 19, 1967

Before:

HON. DOUGLAS F. YOUNG, County Court Judge, and a Jury.

Appearances:

WARREN DOOLITTLE, ESQ. Assistant District Attorney

for the People.

JOEL H. WEINBERG, ESQ.

for the defendant.

MICHAEL YESNER Official Court Reporter THE CLERK: People v. Sebastian Rossilli.

(Jury roll call taken.)

THE CLERK: Jury all present, your Horor.

MR. WEINBERG: The People call William Henderson,

WILLIAM HENDERSON, residing at 68 Tennessee Avenue, Long Beach, Long Island, New York, called as a witness in behalf of the People, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

- Q Bill, how old are you?
- A 19.
- Q And you are a college student?
- A Yes, sir.
- Q Where are you going?
- A North Eastern University.
- Q Do you know Brian Barto and John Swift?
- A Yes, sir, I do.
- Q Brian is known as Whitey; is that right?
- A Yes.
- Q Are they friends of yours?
- A Yes, sir.

- Q Can you recall about two years ago during this month, January, of 1965, going out shoveling snow with Brian Barto and John Swift?
 - A Yes, sir.
- Q Did there come some time when you were in the vicinity of 239 Bay Boulevard?
 - A Yes.
 - Q And did something happen at that time?
 - A Yes, sir.
 - Q Will you tell me?
 - A We were proceeding down Bay Boulevard.

 THE COURT: Bay Boulevard is located where?

 THE WITNESS: That's in Atlantic Beach.
 - Q Continue.

A And we were about to -- well, like you said, we were shoveling snow for money, and we were walking down the street, and we heard shouts, and we turned and three men were running towards us, and John and Whitey run towards them, and I followed suit. Of course, I was interested. And three men got in a car and drove away, and afterwards we were told that a robbery had been committed.

MR.WEINBERG: Objection to that, your Honor.
This should just be as to what he saw.

THE COURT: Sustain the objection as to what the witness said he was told, and I instruct the jury to disregard that.

Q Now, let me ask you this, Bill: Did you take any particular notice of these men particularly?

A I wasn't that interested, no, sir.

Q I ask you to look around the courtroom, and I ask you if you see anybody -- well, let me ask you this: Could you identify any of those men?

A No, sir, I couldn't.

Q Were you asked if you could identify certain men?

A I was asked if I could, but at the time I said I wasn't sure, so I didn't.

Q Now, can you describe the men, at least as far as height or weight goes?

How many men were there, first of all?

A There were three men.

Q Were they all the same size? Describe the relative sizes.

Well, describing the relative size -- you would have to narrow it to the three men.

Q That's what I mean.

- A O.K. One was shorter than the other two.
- Q And these men were running towards you, son?
- A Yes.
- Q All right. Now, how were they running, single file, or in a group or how?
 - A I don't remember.
 - Q You don't recall?
 - A No.
- Q Well, you say one was shorter. Which one would he be among these three men?
 - A (No response.)
- Q Was he the last one, the first one, or the one nearest you?

MR. WEINBERG: That's objected to, your Honor, as being leading. The witness has testified he didn't know how they were running.

THE COURT: Overruled.

Tell us if you know.

- A Well, no, I am not sure at all; I am sorry.
- Q But one was shorter; is that correct?
- A Yes, I do know one was shorter.

MR. WEINBERG: Objected to, your Honor. We are talking about relative things now. When he says

"shorter," I don't know what that means. Were they giants, were they small people? What does the word "shorter" mean?

THE COURT: You can take that up on cross-examination.

- Q Let me ask you this: Were there any giants among those men?
 - A Compared to what, the shorter man?
 - Q Well, you know, 7-foot-tall giants?
 - A I couldn't really tell.
 - Q Were there any 3-foot midgets running?
 - A I couldn't tell.
- Q I ask you to look at this defendant, Sebastian Rossilli, and I ask you whether or not you can say whether or not this was one of the mean?
 - A No, sir, I couldn't.
- Q You testified you just weren't that interested; is that correct?

MR. WEINBERG: I will move to strike that out as being wholly --

THE COURT: Do you mean the last question?

MR. WEINBERG: The last statement by the

prosecutor that he just wasn't that interested.

MR. DOOLITTLE: I think the witness has testified to that.

THE COURT: I will strike it and instruct the jury to disregard it as repetitive.

MR. DOOLITTLE: I have no further questions.

CROSS-EXAMINATION

BY MR. WEINBERG:

Q Mr. Henderson, do you remember what day of the week January 11th was?

A That was about two years ago. I don't think I could.

Q And would you remember whether it was a school day or not a school day?

A This was just conjecture now. I believe it was a school day, and I believe school was closed that day.

Q And on this day you had done some shoveling; is that correct, in the area of Bay Boulevard; is that correct?

A Yes, sir.

Q Now, you were with two other friends; is that correct?

A Yes.

Q And these two other friends with whom you were,

you were walking in which direction, towards where the men were coming from or away from where the men were coming from?

A At the time the men -- at the time we heard the shots I would have to say that we were walking away, as far as I remember.

- Q And you heard shouts; is that correct?

 THE COURT: I think he said "shots".

 THE WITNESS: No, shouts.
- Q You said shouts?
- A Yes.
- Q And you heard shouts; is that correct?
- A Yes, sir.
- Q And when you heard the shouts did you turn around?
 - A Immediately.
 - Q You immediately turned around?
 - A Yes.
- Q And did you see any one other than these three men in the street?
 - A There were three men running towards us.
 - Q Yes.
 - A And further up the block where the house was

there were, I believe -- this is, like I said, very hazy, so I am not quite sure, but I believe there were some people.

- Q Did you hear any gunshots?
- A No.
- Q Now, these three men that ran towards you, how close did they come to you?
 - A To myself or to the group of us?
 - Q To the group of you.
- A Well, John and Brian were ahead of me. They would have been much closer. Now, I was behind. I couldn't really give you an approximatic; I am sorry.
- Q Did you observe whether any of these men had on coats or not?
 - A Yes, sir, I did.
 - Q Did they all have coats on?
 - A I believe they did.
 - Q And did you observe whether they had hats on?
 - A I am sorry, I don't remember.
 - Q You don't remember?
 - A No.
 - Q Did you see any of their faces?
 - A No, I didn't.

- Q You 'idn't see any of their faces?
- A No.
- Q And they came pretty close to you; is that correct?
 - A Like I said, I couldn't say how close they came.

 MR. WEINBERG: No further questions.

 MR.DOOLITTLE: Thank you, Bill.

 THE COURT: You may step down.

 MR. DOOLITTLE: The People call Mrs. Freilish.
- Avenue, Far Rockaway, Long Island, New York, called as a witness in behalf of the People, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. DOOLITTLE:

- Q Mrs. Freilish, back in 1965, August of 1965, you were single; is that correct?
 - A Yes.
 - Q And what was your maiden name?
 - A Lois Rudy.
 - Q Did you live with your mother, Mrs. Rudy?
 - A Yes, I did.

- Q And where did she live at that time?
- A Atlantic Beach.
- Q Did you live in the vicinity of Mrs. Sydelle

Marcus?

- A Yes.
- Q Did you know Mrs. Sydelle Marcus?
- A Yes.
- Q Did you know her maid?
- A Yes.
- Q Do you know the maid's name?
- A Mary, but I don't know the last name.
- Q Now, did there come some time when Mrs. Marcus moved from Atlantic Beach down to Florida?
 - A Yes.
 - Q What if anything happened to her maid?
 - A My mother hired her.
 - Q And how long did she work for your mother?
 - A About three days.
 - Q And what happened after the three days?
 - A She disappeared.
 - Q Did you owe her certain money?
 - A Yes, but she never collected it.
 - Q She never came back for it?

- A No.
- Q Do you have any idea where Mary is to this day?
- A Not at all.

MR. WEINBERG: Objected to, your Honor, as being irrelevant.

MR. DOOLITTLE: I think it is very relevant, your Honor.

THE COURT: Overruled.

During the time that she worked for you did she live in your home?

A Yes.

MR. DOOLITTLE: I have no further questions. Thank you.

CROSS-EXAMINATION

BY MR. WEINBERG:

Q Mrs. Freilish, at any time prior to today or prior to the last week have you spoken with anyone in the District Attorney's office?

A Yes.

Q When did you speak with someone in the District Attorney's office?

A Yesterday.

Q Prior to yesterday did you speak with anyone in

the District Attorney's office?

- A No.
- Q No one?
- A No.
- Q Is that correct?
- A Yes.
- Q Did you live in the immediate vicinity of Mrs. Marcus?
 - A Yes.
 - Q In January of 1965?
 - A Yes.
 - Q And when did you get married?
 - A June.
 - Q Of 1965?
 - A 1966.
- Q So that you remained with your mother in that area; is that correct?
 - A Yes.
- Q And at any time did a police officer visit your home or a member of the District Attorney's office visit your home with regard to Mary?
 - A I don't know.
 - Q They never talked to you, did they?

A Not to me, no.

MR. WEINBERG: No further questions.

MR. DOOLITTLE: Just one further question.

REDIRECT EXAMINATION

BY MR. DOOLITTLE:

Q Where is your mother now, ma'am?

A In Florida.

MR. WEINBERG: That's objected to, your Honor, at this point. This is redirect, your Honor.

MR. DOOLITTLE: Your Honor, may I make --

THE COURT: I will take it.

MR. DOOLITTLE: Thank you.

THE COURT: You may step down.

MR. DOOLITTLE: The People rest, your Honor.

MR. WEINBERG: The defendant will reserve all his motions.

The defendant is ready to proceed, your Honor.

THE COURT: All right, you may call a witness.

MR. WEINBERG: Grace Perratto.

GRACE

PERRATTO, residing at 165

Mott Street, New York, New York, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

MR. WEINBERG: Your Honor, in view of the fact that this witness has an impediment in hearing I would ask the permission of the Court, if I may, to stand this far away from the witness so that I may speak loud enough so that everybody can hear what she has to say.

THE COURT: Well, you can conduct the examination the way you wish, unless there is some objection.

DIRECT EXAMINATION

BY MR. WEINBERG:

- Q Mrs. Perratto, you live at 165 Mott Street; is that correct?
 - A Yes.
 - Q And are you related to Sebastian Rossilli?
 - A Yes.
 - Q And what are you to Sebastian Rossilli?
 - A His mother-in-law.
 - Q Now, Mrs. Perratto, how old are you?
 - A 55.
 - Q And are you a widow?
 - A Yes.
 - Q When did your husband die?

- A March 14, 1965.
- Q Now, what did your husband do for a living?
- A He worked for the Department of Sanitation.

MR. DOOLITTLE: Objection, your Honor. I think that is wholly immaterial.

THE COURT: Mrs. Perratto, may I explain to you how we operate?

THE WITNESS: Yes.

THE COURT: If there is an objection will you not answer until I have decided whether you should answer or not, please?

THE WITNESS: All right.

THE COURT: Thank you.

Now, you have an objection?

MR. DOOLITTLE: I have an objection. What Mrs. Perratto's husband did is wholly immaterial.

THE COURT: I think it is immaterial. I will sustain the objection.

- Q Mrs. Perratto, have you ever been convicted of a crime?
 - A No.
 - Q Have you ever been arrested?
 - A No.

Q Have you ever testified in any sort of trial or hearing?

A No.

Q Now, Mrs. Perratto, do you remember the day of January 11,1965?

A Yes.

Q You do?

A Yes.

Q Will you tell us how you remember that day?

A That day my son-in-law was arrested.

Q Do you know when your son-in-law was arrested in that day? Do you know what time of the day?

A 6 o'clock at night we got a call.

Q That he was arrested?

A That he was arrested, yes.

Q Now, Mrs. Perratto, prior to 6 o'clock that night had you seen your son-in-law during the course of that day?

A Yes.

Q Now, you reside at 165 Mott Street, correct?

A Right.

Q What apartment do you live in?

A I live in Apartment 5.

- Q And what floor is Apartment 5 on?
- A On the first floor.
- Q And does your daughter and son-in-law live in that building?
- A Oh, in that building on the third floor, Apartment 14.
 - Q Do they have anybody else living with them?
 - A They have a son, Anthony Rossilli.
 - Q And do you have anybody living with you?
 - A No, I am a widow. I live alone.
- Q Now, how many years have you lived in that building?
 - A In that building about 35 years.
- Q Now, on this particular day, January 11th, you say you saw your son-in-law prior to 6 o'clock that night?
- A Yes, but my son-in-law was home all day until a quarter after 3.
- Q When was the first time that day that you saw your son-in-law?
- A At 8:30 in the morning I went to pick up my grandson to take him to school because my daughter was unable to go out. She had an injury on her foot.

MR. DOOLITTIE: Your Honor, I am going to object to this. I don't think she is qualified to testify as to what her daughter had or what her daughter didn't have. I have no objection to her testifying that she went up to take her grandson to school, but as to anything else, your Honor, I think it is based on hearsay, and I don't think this witness is competent to testify to that.

THE COURT: I think it is hearsay, Mr. Doolittle, but again it is something that I think you can go into on cross-examination if you want. I will take it. I don't think there is any harm in it.

MR. WEINBERG: Mr. Stenographer, would you read back the answer so far so that the witness may continue?

(Last answer read as above.)

- Q Where did you go to pick up your grandson?
- A At school.
- Q No, at 8:30.
- A No, I brought him to school at 8:30.
- Q Before you brought him to school did you go to your daughter's apartment?
 - A Yes, I had to go upstairs to pick up my grandson

to dress him up because my daughter was unable to dress him or to do anything. She couldn't stand on her foot.

Q When you got to that apartment did you see anybody present in that apartment?

A My son-in-law was in bed and my daughter was on the couch.

Q And this was approximately 8:30 in the morning is that correct?

A That's right.

Q Now, did you take your grandson to school?

A Yes.

Q And how far away from your house is that school

A Four blocks away.

Q And you walked him to school?

A Yes.

Q And after you took him to school what did you do then?

A I come back home, straightened up my house.

I had to go back 11:30 to pick up my grandson, and before

I picked up my grandson the doctor come to my apartment

because he had to examine my daughter, her foot. I went

upstairs and called my son-in-law to tell my son-in-law to

take my daughter down because the doctor couldn't climb

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up the house because he has a heart condition. So I was there when the doctor was there, and then I went out to pick up my grandson.

Q Now, you say that a doctor came to your apartment?

A Yes.

Q Some time before you went back to pick up your grandson; is that correct?

A That's right.

Q Now, this doctor, do you know his name?

A Dr. Tester.

Q And do you know approximately what time of the morning the doctor came to your house?

A 11:30.

Q Now, the doctor came to your house at approximately 11:30?

A Yes, right.

Q What did you do?

A I went upstairs to tell --

Q Please let me finish the question.

A I am sorry.

Q What did you do when the doctor came to your house?

A I went upstairs to tell my son-in-law that the doctor is downstairs, to take my daughter down. He had to carry her down.

Q Did you in fact see your son-in-law carry your daughter down to your apartment?

A Yes, I stood in my house until he took my daughter down. I stood about five minutes, and then I went out to pick the baby up from school.

Q And you went back to the school at that point; is that correct?

A Yes.

Q Now, did you in fact see your grandson at the school?

A Yes.

Q What did you and your grandson do?

A I took my grandson for lunch, I made him play in the park a little while, and I took him back to school at a quarter to 1.

Q And after you took him back to school at a quarter to 1, what?

A Yes.

Q What did you do after that?

A I went home, and my son-in-law and my daughter

was in my house.

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- Q They were in your house?
- A Yes, in my apartment.
- Q In your apartment?
- A Yes.
- Q And do you know approximately what time you came back to your apartment?
- A My apartment I came back a little after 1, and my son-in-law was there.
 - Q He was there?
 - A Yes.
 - Q What were they doing in your apartment?
- A My son-in-law was looking at television and my daughter was on the couch.
- Q And did you remain in the apartment after that period of time?
- A Yes, until it was time for me to go and pick up the boy.
 - Q Did you then go back to pick up the boy?
 - A Yes, at ten to 3.
 - Q You picked him up?
 - A Yes.
 - Q And what did you do with him after you picked

him up?

A When I picked up the boy I took him home, and my son-in-law was in the house there with us. I undressed the boy, he went down, and I stood in the house.

Q And did there come a time when either you left the house or your son-in-law left the house?

A About a quarter after 3, twenty after 3 somebody called my son-in-law, and my son-in-law went down.

Q And that was the last you saw of him until you heard the telephone call?

A Yes.

Q Now, Mrs. Perratto, do you go to church?

A Yes.

Q Do you understand what you have testified here to today?

A Yes, I do.

Q Did I tell you what to testify here to today?

A No.

Q Was yesterday the first time I ever saw you?

A That's right.

Q You were here all day yesterday waiting to go on the witness stand; is that correct?

A Yes.

Q Now, Mrs. Perratto, knowing full well that you have great love and affection for your daughter and for your son-in-law, would you tell a story here today that is not true?

A No.

MR. WEINBERG: No further questions.

CROSS-EXAMINATION

BY MR. DOOLITTLE:

Q As a matter of fact, Mrs. Perratto, you have never at any time discussed this with Mr. Weinberg, have you?

A We have discussed the case, but he never told me what to say or what to do.

Q When did you discuss the case?

A He just spoke to me yesterday. I never seen Mr. Weinberg at all. I never knew what he looked like.

Q You never saw Mr. Weinberg before yesterday?

A No, it is only yesterday I seen him.

Q Did you ever talk to him on the telephone, Mrs. Perratto?

A No, not me, never.

Q Mrs. Perratto, you were out in the hall this morning before court started?

- A Yes.
- Q Did you see me sitting out there?
- A No.
- Q Didn't you see me standing out there?
- A No, I just seen you when you walked in with the girl and the fellow.
- Q Let me ask you this, Mrs. Perratto: Do you recall being served with a subpoena?
 - A Yes.
 - Q To appear in the District Attorney's office?
 - A Yes.
- Q And do you recall a gray-haired gentleman serving that subpoena on you?
 - A Yes.
- Q And do you recall telling that gray-haired gentleman that you would not appear at the District Attorney's office because your lawyer told you not to appear at the District Attorney's office?
 - A I never says anything like it, never.
- Q Did you ever appear pursuant to that subpoena, Mrs. Perratto?
- A I didn't because we didn't have the money to come, not that I told anybody that we couldn't appear.

Q You were served twice, weren't you, Mrs.
Perratto?

A Yes.

Q And the only time you ever came to the District Attorney's office was yesterday at 4 or 4:30 with Mr. Weinberg; is that correct?

MR. WEINBERG: Objected to, your Honor, on the ground that this witness was here yesterday morning at 9:30 in the morning, was fully prepared to go to the District Attorney's office at 2:30 in the afternoon yesterday. This case was recessed --

THE COURT: All right, Mr.Weinberg. You may ask those questions on redirect.

Q You never did come in pursuant to two subpoenas that were served on you; is that correct?

MR. WEINBERG: Objected to.

A That's correct.

THE COURT: Overruled.

Q You were subpoensed in September of 1966; is that correct, Mrs. Perratto?

A Yes.

Q You didn't come into the District Attorney's office?

A No.

Q You didn't call the District Attorney's office, did you, Mrs. Perratto?

A No.

Q You were subpoenaed again on September 6, 1966; is that correct?

A That's right.

Q You didn't come into the District Attorney's office at that time, did you?

A No.

Q Incidentally, your daughter was subpoensed on both of those days, too, wasn't she?

A That's right.

Q Did you discuss the subpoena with your daughter?

A No.

Q When you were subpoenaed and your daughter was subpoenaed you never talked about the subpoenas with your daughter; is that right?

A No, we didn't talk about it.

Q You didn't know what she was going to do, she didn't know what you were going to do; is that correct?

A Correct.

Q But you never came into the District Attorney's office, did you?

MR. WEINBERG: That's the fourth time.

THE COURT: Excuse me. Did you get an answer? What was the answer?

Q You never came into the District Attorney's office in September or December, and you never called the District Attorney's office; is that correct?

MR. WEINBERG: That is objected to, your Honor, as the fourth time that the District Attorney has had the same question asked and answered by himself.

THE COURT: It's cross-examination; I will permit it.

Q I didn't get your answer, Mrs. Perratto.

MR. DOOLITTLE: Would you read the question again, Mr. Yesner?

(Pending question read as above.)

- Q Can you answer that question, ma'am?
- A (No response.)
- Q Isn't it a fact, Mrs.Perratto, that the man who served a subpoena on you, you told him you wouldn't come because Mr. Weinberg told you not to come?
 - A No, I never told him anything like that.

- Q You never said anything to him?
- A No, not from me; not from me.
- Q Now, Mrs. Perratto, there is no question you love your daughter?
 - A Of course I do.
 - Q You love your son-in-law?
 - A Yes.
 - Q Incidentally, what day was this January the 11t
 - A What day?
 - Q Yes, what day of the week was it?
 - A Of the week, on Monday.
 - Q It was a Monday? Your son wasn't working?
 - A No, he wasn't working at the time.
- Q And for how long prior to that hadn't he been working?

MR. WEINBERG: That's objected to, your Honor, as being irrelevant.

THE COURT: I will allow it. Overruled.

- A He wasn't working at that time. I know that he wasn't working.
- Q Well, for how long hadn't he been working, ma'am, prior to that?
 - A Six months, four months, five months; I don't

remember. I can't remember everything.

Q And when you went up there at 8:30 he was in bed, right?

A That's right.

Q He wasn't out looking for a job, was he?

A Well, at the time he couldn't look for a job because he had to take care of my daughter.

Q He wasn't out looking for a job, was he? He was in bed, correct?

A Yes.

Q And you said you saw him again at 11:30; is that correct?

A Yes, right.

Q This Dr. Tester, Mrs. Perratto, is he your family doctor?

A Yes.

Q He is still alive, isn't he?

A Yes, he is.

Q Is he in this courtroom today?

A No.

Q Has he been subpoensed to appear here?

A Well, I wouldn't know.

Q Well, Dr. Tester is not related to Mr. Rossilli,

remember. I can't remember everything.

- Q And when you went up there at 8:30 he was in bed, right?
 - A That's right.
 - Q He wasn't out looking for a job, was he?
- A Well, at the time he couldn't look for a job because he had to take care of my daughter.
- Q He wasn't out looking for a job, was he? He was in bed, correct?
 - A Yes.
- Q And you said you saw him again at 11:30; is that correct?
 - A Yes, right.
- Q This Dr. Tester, Mrs. Perratto, is he your family doctor?
 - A Yes.
 - Q He is still alive, isn't he?
 - A Yes, he is.
 - Q Is he in this courtroom today?
 - A No.
 - Q Has he been subpoenaed to appear here?
 - A Well, I wouldn't know.
 - Q Well, Dr. Tester is not related to Mr. Rossilli

is he?

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- A No, he is not. He is just the family doctor.
- Q And it is your testimony that he actually saw Mr. Rossillo at 11:30 on January 11th; is that correct?
 - A That's right, yes.
- Q He is not outside waiting to testify, is he, ma'am?
 - A Well, I wouldn't know.

THE COURT: You have asked that. It's been answered.

- Q Now, let me ask you this, ma'am: Do you remember the day before?
 - A What do you mean "the day before"?
 - Q The day before January 11, 1966.
 - A The day before --
 - Q 1965, rather.
 - A The 10th?
- Q Right. When did you see your son-in-law for the first time on that day?
- A On that day, all day Sunday. We had dinner together.
- Q When did you see him for the first time, what time?

- A What time?
- Q Right.
- A I am telling you he was upstairs until about 1 o'clock and then we have dinner about 2, and we were together.
 - Q Do you mean you were with him until 11 o'clock?
- A Yes, he was upstairs with his wife and then they come down.
 - Q The first time you saw him was at 11 o'clock?
 - A But he was in the house all day with us.
- Q Well, you were down in your apartment; is that correct?
- A Yes, but he takes my daughter down because they have dinner in my house.
- Q How about the Friday before that Monday? What time did you see him for the first time then?

MR. WEINBERG: Objected to, your Honor, as being wholly irrelevant. We are talking about a specific day.

THE COURT: Overruled. It is a question of credibility.

- Q The Friday before January 11th, Mrs. Perratto?
- A Well, I seen him but I don't remember the time.

- Q What time?
- A At night we used to have dinner together at 5:30.
- Q Mrs. Perrato, did you see him on the Friday before this Monday?
 - A Yes.
 - Q What time did you see him for the first time?
 - A In the afternoon.
 - Q What time?
 - A About 3 o'clock.
 - Q What time, ma'am?
 - A In the afternoon at about 3 o'clock.
 - Q Couldn't have been 2 o'clock?
- A 3 o'clock, 2 o'clock, but I see him. I always see him every day; I used to see my son-in-law.
- Q Did you see him on the Thursday before that at 2 o'clock?
- A I am telling you I see my son-in-law every day, but I can't tell you the exact time.
- Q Mrs. Perratto, I am not trying to trick you.

 If you don't understand the question, ma'am, say you don't understand it.
 - A No, I didn't say I don't understand.

- Q You say on the Friday before that Monday you saw your son-in-law at 2 o'clock, right?
 - A Yes.
 - O For the first time?
 - A Yes.
 - Q How about the day before that, Thursday?
 - A I seen him every day.
 - Q At 2 o'clock?
- A Not at 2 o'clock. It could have been earlier, it could have been --

MR. WEINBERG: Your Honor, I object.

THE COURT: Just a minute. Let me hear the objection.

Gentlemen, I would like you to come to the bench, please.

Would you have the witness step down.

(Discussion held at the bench out of the hearing of the reporter and the jury.)

- Q Now, Mrs. Perratto, you say you talked to Mr. Weinberg yesterday for the first time, right?
 - A First time I seen him, yes; yesterday.
- Q You knew, incidentally, he was your son's lawyer prior to yesterday, didn't you?

A Yesterday I spoke to Mr. Weinberg, but I never knew -- he was my son-in-law's attorney that my daughter used to talk about it, but I never met Mr. Weinberg until yesterday.

- Q You knew he was your son's lawyer?
- A Yes.

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- Q You never went to his office?
- A No, never.
- Q He never visited the home?
- A Never.
- Q Before yesterday he had no idea of what you were going to testify to; is that right?
 - A Right.
- Q Are you aware, ma'am, that a bill of particulars was submitted on September 29, 1965, giving you as an alibi witness, giving your name as an alibi witness; did you know that?
 - A No.
 - Q You didn't know that, ma'am?
- All right. Well, let me ask you this: You say you remember that day for what reason?
 - A Because my son-in-law was arrested on that day.

- Q Well, that wasn't --
- A January 11th.
- Q In Nassau County he was arrested?

MR. WEINBERG: This is objected to.

MR. DOOLITTLE: This was brought out on direct examination.

MR. WEINBERG: There was a simple statement made that she remembered the day because her son-in-law was arrested.

THE COURT: What is your objection? I don't understand it.

MR. WEINBERG: May I approach the bench?

THE COURT: Yes, you may, surely.

(Discussion held at the bench out of the hearing of the reporter and the jury.)

MR. DOOLITTLE: I will withdraw the question.

- Q You say that you recall this date because on this date your son-in-law was arrested; is that correct?
 - A Right.
- Q He wasn't arrested in Nassau County, was he, ma'am?
- A I don't know where he was arrested. All I know is he was arrested.

A (No response.)

Q Ma'am?

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A I don't know.

Q Do you know a Sidney and Ellen Lakeman? Did you ever hear of them before?

A No.

Q Well, their names are listed as witnesses, alibi witnesses. Do you know them at all?

A No, I don't know them.

MR. DOOLITTLE: Your Honor, at this time I would like to offer into evidence a bill of particulars submitted by Mr. Joel Weinberg as to the alibi witnesses to be produced on this trial.

MR. WEINBERG: Respectfully except, your Honor.

THE COURT: All right. Do you want to come up to the bench, please?

(Discussion held at the bench out of the hearing of the jury and the reporter.)

MR. DOOLITTLE: I will withdraw the offer at this time.

Q You don't know Sidney and Ellen Lakeman; is

that correct?

A No.

Q Now, incidentally, you never discussed what you were going to testify to with your daughter, did you, ma'am?

A We used to talk about it just -- not that we used to discuss anything, no. We used to talk about my son-in-law, about the trouble he was in.

Q In other words, you talked over with your daughter what time your son was there, what time you saw him, right?

A No -- that I seen him. I didn't have to discuss that with my daughter. I was in the house. I seen.

Q Maybe you misunderstood my question, Mrs. Perratto.

Prior to coming to court here you said you never talk to Mr. Weinberg until yesterday, right?

A That's right.

Q I asked you if you talked to your daughter and said to her, "Well, I am going to testify that your husband was in the house at 11:30"?

A No, I didn't have to talk to my daughter.

Q You never mentioned 11:30 to your daughter?

- A No, I didn't have to.
- Q Did you ever mention Dr. Tester to your daughter?
- A No. Why was I going to mention that when I knew Dr. Tester was going to come to look at my daughter?
 - Q But you never discussed that with your daughter
 - A No.

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- Q You never discussed the fact with your daughter that you were going to testify to the fact that you picked up your grandson, took him to school and brought him back?
 - A No.
- Q You never discussed with your daughter any of the things that you testified to?
 - A No.
 - O Before this jury?
 - A No.
 - Q Is that correct?
 - A Right.
 - Q You love your daughter very much, ma'am?
 - A I do.
 - Q And you love your son-in-law very much?
 - A Yes.

MR. DOOLITTLE: I have no further questions.

Thank you, ma'am.

REDIRECT EXAMINATION

BY MR. WEINBERG:

Q Mrs. Perratto, one final question: Even though you love your daughter and you love your son-in-law very much, are the facts that you have stated here today before this jury the true facts? Is that a fact, what you have set forth here?

A Yes.

MR. WEINBERG: No further questions.

THE WITNESS: See, I would like to express my own opinion of what he is trying to tell me. I didn't have to discuss --

MR. DOOLITTLE: If your Honor please, I think that is wholly improper.

THE COURT: Just answer the questions.

MR. WEINBERG: No further questions.

THE COURT: You may step down.

THE WITNESS: O.K.

MR. WEINBERG: Marie Rossilli.

MARIE

ROSSILLI, residing at 165 Mott

Street, New York, New York, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. WEINBERG:

Q Mrs. Rossilli, are you the wife of the defendant Sebastian Rossilli?

A Yes.

Q Will you speak up loudly so I can hear you?

A Yes, sir.

Q And where do you live?

A 165 Mott Street.

Q Manhattan?

A Yes.

Q What apartment do you live in there?

A 14.

Q And with whom do you live besides your husband?

A My son.

Q And what is his name?

A Anthony Rossilli.

Q Now, this building that you lived in, what type of building is it?

A Four-family building -- four-story building.

- Q Four-story building?
- A Yes.
- Q Does your mother live in the same building?
- A Yes.
- O Now, where does she live?
- A She lives on the first floor.
- Q Now, how many years have you been married?
- A Nine years.
- Q And do you know how many years you have lived in that building?
 - A 31 years; all my life.
- Q And your mother -- was your father alive in 1965?

MR. DOOLITTLE: Objection, your Honor. That is immaterial.

THE COURT: I will take it.

- Q Was your father alive in 1965?
- A My father passed away in 1965.
- Q And do you know what apartment your mother lives in?
 - A Apartment 5.
- Q And did your mother live in Apartment 5 on or about January 11, 1965?

- A Yes.
- Q Now, do you remember the date of January 11, 1965?
 - A Yes.
 - Q Now, how do you remember that day?
 - A My husband was arrested that day.
- Q And do you know when you found out that your husband was arrested?
 - A (No response.)
 - Q Do you remember what time of the day it was?
- A It was around suppertime that we received a call.
 - Q You received a call?
 - A Yes, sir.
- Q Now, prior to your husband being arrested that day had you seen your husband earlier in the day?
- A My husband was with me all day long up until after 3 o'clock.
- Q When you say that, did you have occasion to see your mother-in-law that day?
 - A My mother-in-law?
 - Q Your mother, rather.
 - A My mother, yes.

Q Well, on that day when was the first time during the course of the day of January 11, 1965, when you first saw your mother?

A Well, she come up to get my son in the morning She took him to school for me. I wasn't able to.

Q Had you been injured?

A I was injured January 1st on my foot. I was hit with a firecracker.

Q And your mother came up to take your son to school that day?

A Yes, as she did, you know, the rest of the month. The whole month of January she took my son to school.

Q Now, when your mother came up to the apartment was your husband in the apartment?

A Yes, my husband was in the apartment.

Q Now, what happened after your mother took your son to school that morning? What do you remember, if anything?

A Well, my husband was asleep, and I was on the couch. She took my son to school and then the doctor came to see me, Dr. Tester, and he wasn't able to come up to the third floor. Any time I called Dr. Tester my husband had

to carry me down to my mother's apartment because I wasn't able to walk on my foot.

- Q Do you remember approximately what time that day Dr. Tester came?
 - A It was before lunchtime.
- Q When Dr. Tester came how did you know Dr. Tester was present in the building?
 - A My mother called us.
- Q And when your mother called you did she call you by telephone or did she come up to the apartment?
 - A No, she called us in the hall.
 - Q In the hall?
 - A Yes.

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- Q And what happened after your mother called you?
- A My husband took me down, and Dr. Tester was examining my foot.
- Q And at that point when your husband took you down and Dr. Tester examined your foot, did your mother remain down there for a long period of time?
- A No, she went to pick up my son because it was just before lunchtime.
- Q And after Dr. Tester examined you did your husband remain with you?

- A Yes, my husband stayed with me.
- Q Did you go back upstairs to the other apartmen
- A No, no.
- Q You stayed at the same apartment?
- A Yes.
- Q And did any other visitors come to that apartment that day?
 - A No.
- Q Did your mother return to the apartment that day?
- A Yes, she did. She returned to the apartment before she picked up my son at 3 o'clock, but she was with us before then.
- Q She was with you before then? Did she see you husband with you there that day?
- A Yes, she was with us. She had coffee with us and then she went to pick up my son.
- Q And then did she come back after she picked up your son?
 - A Yes, she took my son home.
- Q Now, what time did your son come home, roughly, that day?
 - A Well, he comes out of school at 3 o'clock, but

by the time they come home it's five minutes, more or less.

- Q Was your husband still in the apartment at that point?
 - A Yes, he still was there.
- Q And do you know what time -- did your husband ever leave the apartment that day?
 - A No, he didn't leave me at all.
 - Q Well, didn't he go out at any point that day?
- A After 3 he went out. Somebody called him, and he went down, and that was the last we saw of him.
 - Q Until you heard of his arrest; is that correct?
 - A Yes.

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- Q Now, Mrs. Rossilli, do you love your husband?
- A Yes.
- Q And do you understand that you are testifying under oath here today?

MR. DOOLITTLE: Objection, your Honor.

A Yes.

MR. DOOLITTLE: I don't think that's a proper question.

THE COURT: I will take it.

Q And everything that you have said in the last number of minutes to the jury and to the Judge and to myself

has been true?

A Yes, sir.

MR.WEINBERG: No further questions.

THE COURT: I think I will take a recess.

MR. DOOLITTLE: I will be very short, your

Honor, if I may.

THE COURT: All right.

MR. DOOLITTLE: I hate to interrupt at this point.

CROSS-EXAMINATION

BY MR. DOOLITTLE:

- Q Mrs. Rossilli --
- A Yes.
- Q -- did you ever discuss this case with Mr.

Weinberg?

- A Yes.
- Q When for the first time, ma'am?
- A Well, recently.
- Q No, I mean when for the first time after he got into the case?
- A Gee, I don't remember. I don't understand the question, frankly.
 - Q Did you visit his office?

- A No, I never visited. I spoke to him over the phone, and I don't remember exactly when we discussed the case, you know, the first time.
 - Q He never came to 165 Mott Street to talk to you?
 - A Never, no.
- Q Do you recall on September 6, 1966, being served with a subpoena to come to the District Attorney's office?
 - A Yes.
- Q You have seen that gray-haired gentleman outside haven't you?
 - A I see a lot of gentlemen outside.
 - Q Well, did you see me this morning when I came in?
 - A Yes.
 - Q I was talking to the gray-haired gentleman?
 - A You were talking to quite a few people.
 - Q Well, did you see one gray-haired man?
- A I am sorry, but when you are nervous you don't remember faces.
- Q Well, you were served with a subpoena; is that correct?
- A Yes, I was. I was served with a subpoena twice.

- Q Right. On September 6th --
- A I don't remember the dates.
- September 9th, I think, or somewhere around there?
 - A Twice.
 - Q And September 6th?
 - A Yes.
 - Q Both of 1966?
 - A That's right.
- Q Now, isn't it a fact that you told that process server who served it that you couldn't appear because your lawyer told you not to appear?
- A I says that I couldn't appear because my lawyer told me that -- yes, you are right.
- Q Now, you have never discussed what you are going to testify to on the witness stand with your mother, have you, ma'am?
 - A No. Whatever we are saying is the truth.
- Q No. I mean, prior to your sitting down here today --
 - A Yes, we discussed it.
 - Q You did discuss it?
 - A Yes.

Q In other words, you have told your mother that you were going to testify that your husband was in bed?

A No, I didn't tell my mother what to say, and she didn't tell me what to say.

Q I am not asking you that. You say you discussed it?

A Yes.

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Q Did you discuss with your mother the fact that your husband was in bed when she first came up?

A No.

Q Well, did you have a conversation about that after it happened, ma'am?

A No.

Q You never had a conversation about that?

A We talked about it but she seen him in bed that day.

Q Well, I am not saying that she didn't see him, Mrs. Rossilli.

A I know that, but you are trying to confuse me.

Q No, I am not, ma'am. If you don't understand the question, Mrs. Rossilli, you just tell me that you don't understand it, O.K.?

- A Yes.
- Q Do you know what "discuss" means, don't you?
- A Yes.
- Q Did you ever discuss what you testified here today with your mother?
 - A Yes.
 - Q On many occasions, right?
 - A Many occasions.
 - Q Your husband is involved here, right?
 - A Yes.
 - Q You love your husband, don't you, ma'am?
 - A Yes, I do.
- Q Your husband, incidentally, wasn't working on this particular day?
 - A No, he wasn't.
- Q He wasn't going out to look for a job that day, was he?
- A My husband is a sick fellow. He is an epileptic.
- Q But he didn't go out and look for a job on that day; is that right?
 - A No, he didn't.
 - Q Is Dr. Tester still your family doctor?

Q And Dr. Tester is not here today; is that right?

A No, he is not able to come.

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MR. DOOLITTLE: I have no further questions.

Thank you very much.

THE COURT: Any further questions?

MR. WEINBERG: No redirect.

THE COURT: You may step down.

THE WITNESS: Thank you.

THE COURT: We will take a recess.

Gentlemen of the jury --

MR. WEINBERG: Your Honor, that is the defendant's case.

THE COURT: The defendant rests?

MR. WEINBERG: The defendant rests.

THE COURT: Do you have any further witnesses?

MR. DOOLITTLE: I may possibly have a rebuttal witness. I want to make an offer of proof in the absence of the jury.

THE COURT: All right.

Gentlemen of the jury, don't discuss the case among yourselves or with anyone else. Please don't

form any opinion or express any opinion until the case is finally submitted to you.

Follow the attendant, please.

(Thereupon the jury withdrew from the courtroom.)

(The following ensued in the absence of the jury:)

MR. DOOLITTLE: Your Honor, at this time -I think counsel has rested. I guess he has to make
his motions before I offer any rebuttal.

THE COURT: Yes.

MR. DOOLITTLE: He didn't make his motions at the end of the People's case.

THE COURT: That's right.

Do you want to make your motions?

MR. DOOLITTLE: Do you want to reserve them until after I offer my rebuttal?

MR. WEINBERG: It really doesn't matter to me.

THE COURT: Well, why don't we save them until after there is a rebuttal, if there is a rebuttal?

MR. WEINBERG: Fine.

THE COURT: Of course, we want to do it in the absence of the jury, so we will make arrangements

accordingly.

MR. DOOLLITTLE: Before I make an offer of this, your Honor, I would like to go down and talk to my law department about it.

THE COURT: Right.

MR. DOOLITTLE: We are going to have a recess anyway. May we have about ten minutes, your Honor? THE COURT: Yes.

MR. DOOLITTLE: I understand the Court has a sentence. Mr. Martin Weinberg of our office will take it.

THE COURT: Yes, we will take that sentence.

(A recess was taken.)

(After the recess the following ensued in the absence of the jury:)

THE COURT: Ready for motions?

THE CLERK: People v. Sebastian Rossilli, continued.

MR. WEINBERG: Your Honor, at this time the defendant moves to dismiss each of the counts in the indictment predicated upon the fact that the People have failed to prove its case beyond a

reasonable doubt. At best, your Honor, there is one witness whose testimony I vigorously oppose having been introduced in this matter, to wit, one William Brown, who testified at a felony hearing several years ago to the effect that he recognized this defendant and that this defendant wore a hat, and that he was afraid of police pressures. This witness has not been produced here for this trial and, although your Honor has ruled that the People have with due diligence attempted to produce this witness here today or at the commencement of the trial, this entire trial is bottomed upon the testimony of that witness.

I maintain that Section 8 of the Code of Criminal Procedure must be found violative of the Constitution if in truth that is the only witness that can testify to the identity of this defendant at the time of a trial.

Two, at best, the two identifying witnesses, each of whom for a fleeting moment saw passers-by on the street, each of them stated that they did not see anybody coming from the house where the alleged No further motions, your Honor.

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MR. DOOLITTLE: Your Honor, I respectfully submit that there is a clear question of fact for a jury here. I won't go through the evidence. The Court has heard it, it's been very brief. This defendant has been identified by three persons as being in and around the vicinity of the robbery. Mr. Brown, in fact, testified -- and I submit the Court has properly ruled under Section 8 as to the admissibility of this -- that this was one of the men that actually came out of the house and pointed a gun at him.

THE COURT: I will deny your motion, Mr. Weinberg.

MR. WEINBERG: Respectfully except, your Hono and at this point I would like to put one more motion on the record, if I may.

THE COURT: Yes.

MR. WEINBERG: In addition to the hydra-headed objection that I made to the introduction of Mr. Brown's testimony, having heard all of the evidence, and prior to its submission to the jury, it is manifest that a visual seeing be had of Mr. William Brown by the jury when Mr. William Brown is the gravamen of the People's case. The absence of that denies this defendant not only due process of law, not only confrontation of witnesses, not only the right to cross-examination, but fundamental exception

under the Constitution.

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THE COURT: Your motion is denied.

MR. WEINBERG: Ready to sum up, your Honor.

THE COURT: Well, I am going to take a recess.

You can both sum up this afternoon at 2 o'clock.

Send the jury to lunch.

(A luncheon recess was taken.)

AFTERNOON SESSION

MR. WEINBERG: May it please the Court, it was my mistake, and I would just ask for two other further motions that I had.

THE COURT: Yes, I will receive them.

MR. WEINBERG: The first is for a directed verdict in favor of this defendant predicated upon the evidence that was adduced here, and the second is for a mistrial predicated upon the facts, your Honor, that one of the witnesses, to wit, Barto, who had testified first, went into the hallway, and after his testimony another witness, the other young gentleman, whose name was Swift, took the stand and testified that he had had a conversation with Mr. Barto outside the courtroom, and he stated in his sworn testimony that Mr. Barto -- he asked Mr. Barto what questions had been asked to him. and pursuant to the direction of this Court which was originally made prior to the commencement of the trial, and to which both counsel adhered, all witnesses were excluded from the courtroom. I would

therefore, move, in view of the fact that identity

is the key to the entire case, and that the sole witnesses on identity as to this defendant -excluding the alibi -- was a man by the name of
Brown, who does not appear here, a man by the name
of Barto, who was a young man of 15 or 16 at the time,
and a man by the name of Swift who talks about what
transpired in the courtroom outside the courtroom.
This, I believe, is so substantial that this should
warrant a mistrial of this case at this time.

THE COURT: Will you go back and read to me what Mr. Weinberg said about the witness going out of the courtroom?

(Colloquy read as above.)

THE COURT: If I understand your motion, Mr. Weinberg, it is based on a statement made by the witness from the witness stand; is that right?

MR. WEINBERG: That is correct, your Honor.

THE COURT: Well, I will deny your first motion for a directed verdict. I will also deny your second motion. The fact that a witness disobeys instructions of the Court -- assuming that that is what happened because I don't whether those

instructions were ever actually delivered to him -but assuming that he does, it is not grounds for
rejecting his testimony. It might be cause for
calling him back if this were only learned after
both sides had rested, but he testified to it from
the witness stand, as you have just told me, and
gave you every opportunity to cross-examine him about
that. So I will deny your motion.

MR. WEINBERG: Exception.

(The jury thereupon entered the courtroom.)

THE CLERK: Trial of People v. Sebastian Rossilli is continued.

(Roll call of jurors taken; all present.)

THE COURT: Both sides ready?

MR. WEINBERG: Both sides ready.

MR. DOOLITTLE: Yes, your Honor.

THE COURT: Mr. Weinberg?

(Mr. Weinberg summed up to the jury in behalf of the defendant as follows:)

MR. WEINBERG: May it please the Court, Mr. Foreman, gentlemen of the jury, Mr. Alternate: In the orderly course of a trial in a criminal case the

general modus of operation is that there is an impaneling of a jury, and after the impaneling of a jury the People have the right to open before the jury, and then the defendant has the right to either open or waive its opening, and then you hear the testimony, and at the conclusion of the trial it is the defendant that first must sum up to the jury. At this time, in view of the fact that I represented this defendant throughout this entire trial, it is incumbent upon me to sum up to you gentlemen of the jury, and at this time this will be the last opportunity of the defendant to set forth his position as relates to the evidence that was set forth in this courtroom for the past two days.

I would like each one of you, if I may, to disassociate yourselves from several factors. Disassociate yourself from the fact that the prosecutor is a golden-tongue orator. Disassociate yourself from the fact that you have seen the prosecutor on several days wear two or three different suits. Disassociate yourselves from the fact that I have worn the same suit on three different days. This

is not germane to the issue at hand. There is onle one thing that I ask you to hold your full attention on, that is, what the witnesses said as relates to this defendant.

Now, when I had the opportunity to open before you at the start of the trial I was very brief, and I stated at that point all that I wanted you to do was to hold the prosecutor to each and every item that he said he would prove in this case.

I know you remember the prosecutor's opening statement very well, and I shan't go through that again, but I would ask that you hold in the back of your minds what he said he would prove in this case.

It is not incumbent upon this defendant to disprove anything. He doesn't have to prove anything. The prosecutor must prove this defendant's guilt beyond a reasonable doubt.

After I have concluded my summation and Mr. Doolittle has concluded his summation, Judge Young will tell you the law to be applied to the facts in this case, but you gentlemen of the jury are the sole arbiters of the facts.

Now, on opening day I think you will recall

that Mr. Doolittle used his hands in showing you that there didn't have to be a balancing of the scales in this case. This is not a civil case where money damages are involved, where if the scales go a little one way as opposed to the other way your determination would reflect that. This is a criminal case, and in this particular type of case, and I reemphasize this, it is a question of reasonable doubt. His Honor will charge you as to what reasonable doubt is. There are many, many versions of what reasonable doubt is interpreted to mean, but the Court of Appeals and myself have construed it to mean that if after careful and honest review and consideration of the evidence here there is any doubt in your mind that you as prudent and reasonable people should find in favor of this defendant on any issue --

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MR. DOOLITTLE: If your Honor please, I am going to absolutely object to that. That is not the law. Any doubt is not the law. It is a reasonable doubt. Now, I think counsel is probably inadvertently mistaken there, but I think that statement is

absolutely unqualifiedly incorrect, your Honor.

THE COURT: Of course, it is the province of the Court to instruct the jury as to the law, and I will also agree with Mr. Doolittle that the standard is reasonable doubt and not any doubt.

MR. WEINBERG: If I said "any doubt," I meant to say reasonable doubt, your Honor. I did not do that purposely.

THE COURT: I am sure.

MR. WEINBERG: Now, prior to my going into the testimony that you all heard, you all saw with the exception of one witness, I would like to state to you that we are not here to evaluate a game, money. We are here to evaluate whether or not on the basis of what was said to each of you gentlemen whether or not this defendant is guilty of eight counts in an indictment which was filed by the District Attorney office of Nassau County. These counts are very, very grave and very serious, and without reading each of the counts to you as was set forth by the District Attorney in his opening, gentlemen, I just want to refresh your recollection to the effect that this man is being charged with the following crimes: the crime

of robbery in the first degree, the crime of burglary in the second degree, the crime of grand larceny in the first degree, the crime of assault in the second degree, the crime of assault in the second degree, the crime of assault in the second degree for the third time, and the crime of assault in the second degree for the fourth time, and the crime of assault in the second degree for the fifth time. Each one of these counts is a felony. Therefore, in making your judgment in this case, and before I get to the evidence that was set forth here, I would like you to not think of this in the terms of balls and strikes where you are the arbiter behind the plate and your son is at bat, but think of it in very, very grave and serious terms because a man's life is at stake.

Now, gentlemen of the jury, I am going to read to you --

MR. DOOLITTLE: Your Honor, I am going to again object to that. A man's life is not at stake. Now, that is a false statement, it is incorrect, its sole purpose is to make this jury sympathetic.

THE COURT: Mr. Doolittle, perhaps counsel

overstated the point. His life is not at stake, but I suggest you reserve any further objections until you sum up.

MR. WEINBERG: Now, gentlemen of the jury,
the problem of eyewitness identification is probably
one of the most difficult problems that is presented
to a jury in any criminal case. The late Judge
Jerome Frank in a book dealing with the miscarriage
of justice stated --

MR. DOOLITTLE: If your Honor please, now counsel may only comment on facts in evidence. I am going to object to this. I don't like to keep getting up but --

THE COURT: I will ask you not to read from legal opinions, Mr. Weinberg.

MR. WEINBERG: These are not legal opinions, your Honor.

THE COURT: Well, from legal authorities, either for that matter.

MR. DOOLITTLE: And would the Court apprise
Mr. Weinberg that he can't even comment on what
somebody outside of this courtroom has said.

THE COURT: Well, I won't hold him to that,

Mr. Doolittle. Whatever is fair comment on the

evidence which has been received in this case, and

his interpretation of the evidence, and what he

believes the jury's findings from the evidence should

be, I will permit.

MR. WEINBERG: Well, the major problem with eyewitness identification as construed by me and by others in the legal profession is that there are some vagueries to it as to make it very, very difficult for people under certain types of conditions to fully appreciate what they have seen. People under stress may see one thing, people who are not under stress may see the same object in a different fashion. People who see an object slowly and moving slowly may recall that object in a certain fashion. People who see something moving at great rates of speed and for short periods of time may recall that object in other fashions. Now, fully understanding the problems attendant to eyewitness identification, and fully understanding the seriousness of this crime, as I am sure each of you fully understands, let us review what evidence, if any,

the prosecution has set forth in this case.

Before I do that I would just like to add one more thing, and that is this: We are all, each of us, fully appreciative of law-enforcement agencies. Each of us, if we were not proper America strike that. Each of us condones and goes along with the law-enforcement agency. Each of us abides by the law. That includes each one of you jurors and myself. However, there are times -- and I know that there are several members of the jury who have relatives who are related to law-enforcement agencie but each of us knows certain people under certain pressures react differently to the law-enforcement agency. Having that in mind, having the testimony of the witnesses in mind, and having seen the witnesses, I would like to review with you now what I believe the testimony in this case was. Again, I would like you to disassociate yourself from Mr. Doolittle and from myself. We don't count in this case. It is only what the witnesses said to you that counts.

Now, the first witness was a woman by the name of Sydelle Marcus. She was the victim of this

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Now, she also said some other very sage things, to wit, she said -- and I show you now People's Exhibit 3 from which I am reading, the bedroom or the living room of her home, and I would ask that
each of the jurors take a look at this People's
Exhibit 3 marked into evidence. In that room
Sydelle Marcus said that one of the gentlemen, where
the "X" is marked, had her and another man had
Mary Barsh, the distance can be no more than 8 to
10 feet and, yet, she couldn't identify the other
gentleman, who allegedly is this defendant. That
was the sum and substance of her testimony regarding
who the defendants are in this case. She didn't
know who they were.

After Mrs. Marcus testified we had the testimon of a young man whose last name was Barto. Mr. Barto stated he had been cleaning some sidewalks and with two other men, young fellows of 15, 16 and 17 at that point, saw three men running at him. He didn't see where they came from, didn't see them come out of an apartment, but saw three men running at him. And how were they running? They were running at him. And how were they running? They were running abreast of each other. He was very clear as to that. Not only were they running abreast of each other but he, with two other fellows, was looking right

down at them, and he only saw them for a few fleeting instances. He couldn't remember which man was wearing a hat, which man was not wearing a hat, but he did remember that this defendant did not have a hat and had a black coat. That was his testimony. "What were the characteristics of this defendant?

"He was shorter than the others.

'What else did he have?

"Don't remember.

"What did the other defendant have?
"Don't remember."

They were taller, heavier; no descriptions, nothing. He didn't see th's defendant or any other person for a long period of time. It was a very, very short period of time. He said two of them were without hats and one had a case, and he was apprehensive of the law himself. Now, here is a man who says three of them -- he was positive in this -- that they were going down the street all abreast of each other, two with hats, one without a hat, couldn't describe the others, but he could describe this defendant. From what? From a fleeting second.

After Mr. Barto we have the introduction into evidence of a deposition. The deposition is that of one William Brown, a chauffeur. Now, this deposition that was introduced of William Brown was read to you at length by the District Attorney, and in the reading of this to you you didn't have the opportunity to visually see William Brown on the witness stand. He hasn't been in court here. is not here today. But Mr. Brown had some very definite things to say. He was absolutely positive, assured 100 percent that there was a man holding a gun to his head. Oh, he knew that. Not only did he know that a man was holding a gun to his head, but he knew that all three men had hats, and there was a long section with Mr. Brown on cross-examination in the felony court where they described the type of hat.

"What kind of hat was it?
"Was it a fedora?"

And they finally wound up with a pork-pie hat.

And he saw this man run out of the house with this hat. By the way, Mr. Barto said nobody was carrying

Now I want to read to you from Mr. Brown's examination with regard to his fear, and I don't mean to say we should fear these people, but his fear of law-enforcement agencies. On page 25 of the deposition Mr. Brown says on line 2 as follows:

"Q Now, the first man that came out, was he the one who ran after the maid, Mary?

"A That's the first man.

"Q What was he wearing?

"A I didn't pay any attention to what he was wearing because I thought they were detectives. I didn't pay that much attention. I was afraid.

"Q Were you afraid of detectives?

"A Why not?

"Q Did you do anything wrong?

"A No.

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"Q Have you ever been convicted of a crime, Mr. Brown?

"A No.

"Q What were you afraid of?

"A I am always afraid of the law."

And then Mr. Brown goes into a description of what the people were wearing, and he describes this defendant on page 25, line 23 as follows:

"Q What was he wearing?

"A What was he wearing? He was wearing a sport jacket, a sport shirt, and he was wearing a trench coat that had reversible colors in it.

"Q I don't know what you mean by that, sir; I am sorry.

"A Well, it's just these trench coats that you can wear. When you get in a light with them they are a different color. It makes a different color.

"Q What color was it?

"A Well, it was more of an orange color in the light.

'Q An orange color?

"A Well, I would say.

"Q What color was his sport shirt?

"A His sport shirt was yellow."

And then he goes on to describe the hats, and

in the description of the hats he says at page 26, line 24 as follows:

"Q Was he wearing a hat?

"A Yes, he was.

"Q Now, what did his face look like?

"A What did his face look like? Like the face looks now."

And then he goes on to where there is a whole series of questions that were read to you by the District Attorney when the deposition was let into evidence where he said on page 28 in response to a question as follows:

"Q What was he wearing, Mr. Brown?

"A They all had on trench coats."

And at line 24:

"Q Was the first man wearing a hat?

"A All three were wearing hats.

"Q All three were wearing hats?

"A All three were wearing hats.

"Q What kind of hats?

"A Just hats."

And then they go on to describe the fedora incident and the pork-pie hat, and there was even a funny

statement on page 30 where it is set forth:

"Q It wasn't a cap?

"A It was a hat.

"Q It was a hat?

"A It was a hat-hat."

This man was so sure that he saw a hat on this defendant that he was positive that he had a hat on. Mr. Barto never saw a hat on the defendant.

Now, with regard to the trench coats: These two young fellows walking down the street didn't describe trench coats. One fellow had this type of coat, one fellow had that. They didn't remember any descriptions. They couldn't remember any descriptions. It is impossible to remember a description of anything when people are running by you.

Now we come to Mr. Swift. That is the second young boy. He testified after the deposition was read in. Mr. Swift stated he was out of school -- he was a -- he was afraid of the law, too. But he had a new version of what took place. He didn't see them running down abreast. They came down

single file. Not only did he say they came down in single file, but I asked him whether it was Indian file, and he said yes, that they all came running down. I said, 'What did you see?" He couldn't identify the first man. He didn't know whether he had a hat on or not. He only identified the second man. He didn't have a hat on. The third man he couldn't identify, either, and he only saw this man for a fleeting moment.

This was no protracted period of time where you have had time to observe what I have been doing in this courtroom. These were people running by.

These are two young men. They didn't see these people come out of the house. They just saw three people running down the street. No guns were drawn. One man heard a shot a minute beforehand. That is their testimony.

Oh, they picked him out in the police lineup, of course. Both of them did. How did they pick him out of the police lineup? Well, in identification cases there are certain things that are suggested. If I took any one of you gentlemen and put you in a

police lineup, and put three other men in that lineup who are disproportionate to you, I am sure that somebody would pick you out as a defendant.

There was no description, and I asked one of them what kind of description the other men had.
"One was bigger. I don't remember. One was heavy."
This was their testimony. There were no specifics.
They didn't have a specific recollection of this man's face because it is impossible. It is impossible to follow a man in a fleeting second and get a description of the man.

Now, after we had Mr. Swift -- and I want each of you jurors to recollect how Mr. Swift and Mr. Barto testified before you, the position that they took when they testified before you, the facial approach they had when they testified before you as compared with Mr. William J. Henderson who testified here today. Mr. Henderson testified he was with these other two fellows. He didn't recognize anything. He turned, he saw the same thing that was happening, and he testified he couldn't identify any one of the defendants. He couldn't identify this

defendant. He didn't know what was going on. He just saw people running by and, truth to tell, his is the only testimony that makes sense.

Now, we have the testimony of a woman by the name of Mrs. Freilish. All she testified is that she was the daughter of a woman who had hired a servant and that the servant hadn't picked up her money after three days, and she didn't know where the servant was. That was her whole testimony. That servant was a principal complaining witness in this case. That servant, according to Mrs. Marcus, was bound and tied. Is that the kind of testimony that you eliminate from a case of this type? The three most important people who possibly could identify this defendant are not here. Mrs. Marcus doesn't know the defendant, Mr. Brown wasn't here on the witness stand and the maid is not here. What have we got? We have got three fleeting instances of people making identification. That is the whole case. Mary Barsh is a victim. She is not here. These are the three key witnesses.

Now, let's come to something that the District

Attorney said he would prove to you at the start of this case. Other evidence? What other evidence has the District Attorney shown in this case? Did they get any admissions from this defendant? Did a detective take the stand to say that he spoke with the defendant and got admissions? Did they get someone here who showed the fruits of the crimes?

And before I get to the defense that was interposed by this defendant, to wit, that of alibi,
meaning that he was at another place at the time
that these crimes were committed, I submit to each
of you that the People have shown relatively nothing
in the nature of identifying a man in this particular
case.

Let us take the testimony of the two alibi witnesses and discard it. Let's say it never occurred. Let's say you discard from your minds what I have said here and what Mr. Doolittle will say with regard to the evidence. What have the People shown to identify a defendant for such crimes? They have merely shown some deposition of a witness who is not

in the courtroom that had a gun stuck to his head, and he says he remembers the man who had a hat on. They have shown two boys walking along the street who for an instant saw three men run by, one in single file, the other alongside of each other.

No identification marks. Couldn't describe the jackets, couldn't describe anything. One thing they did know, though. One man knew how to flunk mathematics and knew how to describe a maroon car. That he was very good at.

Now, let's take the two witnesses for the defendant. There is no doubt that each of the witnesses is an interested witness. There is no doubt about that. One witness is the wife of the defendant and the other is the mother-in-law of the defendant. If there were any other witnesses that saw the defendant where these witnesses saw the defendant was, and if that witness had a recollection of it, that witness would be here.

The mother-in-law took the stand, and she stated that she was a woman in her fifties, she was the mother-in-law of this defendant, and she

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at approximately 11:30, or a little thereafter and went to school to pick up the infant. After that she took the infant out to lunch. After the infant was taken out to lunch she came home again and saw the defendant again in her apartment with her daughter, and he remained there until 3 or 3:15 in the afternoon when she came back for the third time with the infant, that somebody called the defendant and he left.

I wasn't present. I don't know what happened, but I do know this: that this woman who is closely related to the defendant was positive in what happened that day. She was also positive that her son-in-law had been arrested that day, and these things make clear in one's mind exactly what transpired.

The wife testified. Again there is a very close relationship, but if nobody else is there, then this is the witness. She testified substantially to what her mother testified to. She said that the mother had seen her in the morning, she had been taken down to the doctor, was in her mother's

apartment, her mother came back in the afternoon and her husband left.

Now, we can't deal in errors in this case. Errors are very dangerous. Errors in money don't mean anything in my opinion. Errors sometimes determining a man's guilt or innocence are very, very important. It is respectfully submitted to you, just as the District Attorney was erroneous -unintentional -- but erroneous in his opening to you as to what happened to Mary Barsh on the eve of trial when he said to you that Mary Barsh had left the employ of Mrs. Marcus three days after this incident and then said to you that he had made an unintentional error. He was wrong. She didn't leave three days after that. She left three days after her employment by Mrs. Rudy. It is an honest mistake, absolutely honest mistake. Is it not possible that any one of us could make an honest mistake as to three people fleeing in the street and come up with a concrete memory of each one -of what one man looked like in the fleeting second? Now, I shan't be much longer because I know

mining the guilt or innocence of this defendant the facts as set forth by the witnesses. I want you to remember that none of the three boys, the two that said that they saw this defendant running down the street, and the third who couldn't identify anyone, ever saw anybody leave from a house. They just saw three men running down the street. They saw no guns, they didn't see hats, they saw one man, couldn't remember what anybody was going down the street with. One fellow had a gray coat, another had a different one. That's normal. You couldn't possibly remember what three men are running by with. Impossible.

Now, I submit to you that the proof in this case that relies wholly on identification made by eyewitnesses, particularly in view of the nature of the eyewitnesses' testimony, is inherently weak and that a person who saw a thief or an attacker briefly and under conditions of stress, such as Mrs. Marcus, such as Mr. Brown, despite the best of their intentions, could be mistaken. I don't even get into the defense of alibi at this point. I say

that on the People's case as submitted to you there was not a paucity of evidence which would in effect identify this defendant.

Now, I say to you, and his Honor will properly charge you, that as to the defense of alibi I do not have to prove that defense of alibi. I want you to understand this. It is up to the defendant to prove his defense of alibi. It is up to the People to prove beyond a reasonable doubt that the alibi did not exist. His Honor will charge you on that point at the end of the case. I say to you if you get past -- which to me seems, beyond doubt, farfetched .-- the first point of identification, I say to you, then, as far as the People are concerned forgetting the alibi, forgetting the two witnesses that have testified here, if you get past that first point and you don't believe these two witnesses, that must be proved again to you beyond a reasonable If you have a reasonable -doubt.

MR. DOOLITTLE: Your Honor, I am going to object to this dissertation of the law. It is not correct. I don't have to come forward and prove anything again. I merely have to prove the guilt

of this defendant beyond a reasonable doubt.

THE COURT: And you have the burden on all issues.

MR. DOOLITTLE: Right.

THE COURT: Of proving his guilt beyond a reasonable doubt.

MR. DOOLITTLE: Right.

THE COURT: That is the law.

MR. WEINBERG: Respectfully except, your Honor, on the case of People v. Elmore. At this point I shan't belabor this any further.

I would like you to just magnify this case in the following areas: The question of was this defendant identified. Please, I know that Mr.

Doolittle will render a brilliant summation, and I ask each of you not to take Mr. Doolittle's word as to what happened because he wasn't there either, not to take my word as to what happened -- I certainly don't know what happened -- but take the words of the witnesses as to what happened in their proper perspective. You had one man under stress, Mr. Brown. He could virtually be the same type of

individual where in England in a dark room a man punched another man in the eye and, yet, the defendant was identified by the complainant on the ground that sparks came from his eye and he saw the defendant.

MR. DOOLITTLE: Oh, if your Honor please, I am going to vigorously object to this. That is not fair comment on any evidence here in this trial.

He is bringing something wholly extraneous in.

THE COURT: I think the defendant's counsel is attempting to show the difficulty of identification

MR. DOOLITTLE: No objection to that, but he is bringing in newspaper clippings.

THE COURT: You may take this up in your summations, Mr. Doclittle.

MR. WEINBERG: What I am attempting to show you by that is not the lunacy of that particular point but to show you what happened to people under stress. Under stress they see things that are intirely disproportionate to things that actually took place, and in fleeting instances people see things that never occur.

I would ask each of you, if I may, to refresh in your own recollection and in your own mind what

happened here. Who saw what? How did they see it?

And I want you to disassociate yourselves from my

oratory and that of Mr. Doolittle. Confine yourselves

to the facts in this case.

Thank you.

THE COURT: We will take a recess.

Gentlemen of the jury, please don't discuss
the case among yourselves or with anyone else.
Please don't form any opinion or express any opinion
until the case is finally submitted to you.

(A recess was taken.)

(After recess:)

THE COURT: Gentlemen, I have a question here from you, and I will tell you at this point that I will answer your question at the time I give you my charge as to the law, and at this time the answer to your question need not concern you. You can disregard it and give your attention to the completion of the summations and then, as I say, subsequently when I give you my charge I will explain to you what application, if any, this has to our case.

(Mr. Doolittle summed up to the jury in behalf

of the People as follows:)

MR. DOOLITTLE: May it please the Court, Mr. Foreman, gentlemen of the jury, Mr. Alternate Juror: As I told you initially, I would have an opportunity at the end of the entire case to sum up to you and give you the People's impressions as to what inferences naturally flow from the evidence that has been presented to you.

Now, fortunately, it appears as if you are only going to be on jury duty for a week. This has been a very short trial. However, as short as the trial was, before I go into the case and before I go into my summation, I would like to personally on my behalf and on behalf of the District Attorney of this county thank you for the patience, the diligence and the attention with which you sat since Tuesday listening to this case, and I say that whole-heartedly because what you have just gone through is probably the highest civic duty that you will ever perform. So that no matter what the outcome of this case is, gentlemen, no matter what your verdict is, whether you agree, whether you disagree, whether you

find the defendant guilty or not guilty, you can be well proud of yourselves as you walk out of this courtroom and feel that in the highest traditions you have fulfilled the duty of a juror.

Now, the case has been relatively short, gentlemen, and I probably won't go into too much of the actual testimony. I am sure it is fresh in your minds. I think we started taking testimony yesterday morning, and we had two very brief witnesses today. However, in the event that I do go into a review of any of the testimony -- in fact, if Mr. Weinberg went into a review of any of the testimony, or even if the Judge goes into a review of the testimony, which under the law he generally does, and my recollection or Mr. Weinberg's recollection, or even in fact the Judge's recollection of the facts, gentlemen -- the Judge will tell you this -- disregard our recollection of the facts. It is your recollection and only your recollection of the facts that count, and I assure you, gentlemen, if at any time I refer to the facts and my recollection is different than yours that I am not trying to confuse you, and I am not trying to kid you.

I am not trying to be dishonest with you in any
way. It is just that my recollection is as I give if
But if it doesn't agree with yours, disregard my
recollection. Again I say, and as the Judge will
repeat and repeat, it is your recollection that coun

Now, this is a basically simple case, gentleme This defendant has been indicted in eight counts for the crime of robbery in the first degree, the crime of burglary in the second degree, grand larceny in the first degree, assault on Sydelle Marcus in attempting the crime of robbery and grand larceny, the attempt -- rather, the assault in the second degree with a gun on Sydelle Marcus, assault in the second degree in committing the crime of robbery and grand larceny with Mary Barsh, the seventh count is an assault in the second degree on Mary Barsh by the aid of a gun, and the eighth count is the assault in the second degree on William Brown with a gun.

Now, let's see if we can break this case down into two elements.

Number one, were these crimes committed on the person and at the premises of Sydelle Marcus and on the persons of Mary Barsh and William Brown? I don't

think the defendant even raises any issue about that. There is no question but that the crime of robbery in the first degree, larceny, burglary and these various assaults were committed. It has been proven beyond any reasonable doubt that these crimes were committed. The issue before you, gentlemen, is was this defendant Sebastian Rossilli, aided and abetted and aiding and abetting two unknown persons, one of the participants and one of the actors who committed these crimes. As I say, I don't think there is any issue, gentlemen, before you as to whether or not these crimes were committed. The only issue was whether or not Rossilli was there and whether or not Rossilli was one of the participants in this crime. The whole issue, as Mr. Weinberg said and as the People have said, is one of identification.

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Now, I say this to you: that the People of the State of New York have produced every conceivable and available witness who could testify as to what happened at 239 Bay Boulevard in Atlantic Beach, Nassau County, New York. We have produced everybody available. Mary Barsh -- nobody who ever knew her knows where she is. William Brown: The Court as a

matter of law, because he was unavailable and could not be subpoensed, permitted his deposition to be introduced into evidence, which deposition was taken at a felony examination when this defendant was represented by Irwin Germaise, a defense counsel and an extremely competent defense counsel. So that the testimony of William Brown is substantive proof. It is proof of what is contained herein (indicating).

The only issue before you gentlemen is whom do you believe. Do you believe Brian Barto, John Swift, William Brown, or do you believe the mother-in-law and the wife of the defendant?

MR. WEINBERG: Your Honor --

MR. DOOLITTLE: That is the simple issue.

MR. WEINBERG: Your Honor, that is not the sole issue in this case. It is not a question of who you believe.

THE COURT: Well, that's Mr. Doolittle's view of the case.

MR. DOOLITTLE: Gentlemen, your function -and the Court will explain it to you -- is to listen
to testimony and appraise that testimony. Look at

the witnesses, listen to the witnesses. In the case of the deposition, gentlemen, listen to the witness. Listen to the direct examination and the cross-examination. The cross-examination is always what they call the sword of truth. That is the thing where you ultimately find out the truth. Incidentally, I will get into how the sword of truth disclosed from William Brown on the felony exam on cross-examination where he stated as to his identification in a crowded courtroom in Brooklyn. But we will get to that later.

The sole issue for you is that if you believe Brian Barto, if you believe John Swift, if you believe William Brown that Sebastian Rossilli was the man, then, you must convict. If you believe the mother-in-law, if you believe the wife, I tell you you have an absolute and unqualified duty to acquit, and that's how basically simple this issue is. No issue really has been raised as to the fact that these crimes were committed.

Now, how do you judge whether a witness is telling the truth? How do you do that? You do it every day in your lives, gentlemen. You do it every day in your lives. You do it with your children, you do it with your business associates. Every day of your life you judge whether or not paople are telling the truth, and one of the basic ways that you look at a person's story and appraise it and carve it is to look at what interest a person has in saying what he has to say or what he has said what interest do any of these witnesses have in the outcome of this particular case?

What interest does Brian Barto have, who came up from Florida and is back now in college, to come up here and testify? What interest does John Swift have, who was taken out of school to come here and testify? What interest did William Brown have in the outcome of this case? If you find any interest whatsoever that impeaches the credibility of those witnesses, gentlemen, so that you can say, "I don't believe those witnesses, but instead I believe the mother-in-law and the wife of the defendant," then, as I say again, gentlemen, you must acquit. It is that simple.

There is one overriding factor agreed to by

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all of these witnesses, Brian Barto, John Swift and William Brown, that is, that this man, Sebastian Rossilli -- and take a look at him, gentlemen -- was one of the men running from the house at 239 Bay Boulevard. William Brown says that this is the man, and he said he looked right in his face, was the one who held the gun to his head. Why would he lie about that? Why would he be mistaken about that?

I told you initially, gentlemen, that I would prove everything that I said I would prove. I told you I would prove Mrs. Sydelle Marcus didn't know who committed the robbery, whether I committed it, and that in fact is what happened. I think Mrs. Marcus was so terrified, so frightened, that it is highly conceivable she probably didn't even open her eyes but two or three times. This woman was in sheer terror of her life, as wouldn't we all be if somebody broke into our homes with loaded pistols or with guns. I will withdraw the "loaded pistols," because there has been no evidence that they were loaded other than the fact that one shot was fired. But her reaction was a pretty normal one.

Now, let's face it, if the People of the State want to make up a case, gentlemen, if we want to dream this thing out of whole cloth, don't you really think we could do a better job than we have done now? We have presented witness who have told you what in their honest belief is the fact, and the things that they are not sure about they tell you that they are not sure about. But they all agree as to one thing, that Sebastian Rossilli was there and that day Sebastian Rossilli was one of these three men.

Now, what is this about details? You know, I could say, 'What color tie did I have on Tuesday?"
You were all looking at me, except I tipped my hand
Tuesday by saying to Mr. Munzer that we both were
wearing striped ties. But, gentlemen, if I hadn't
mentioned that idea, and if I told you to go into
that jury room and fight over what color tie I had on
after I stood before you for an hour and a half,
you wouldn't be able to agree on what color tie I had
on. But what my face looks like, yes. That's what
you were looking at. That's what you were interested

You know, I wouldn't hesitate to say that if in. all twelve of us looked out of the window and a car drove by that we would all agree a car drove by. Let's take the common denominator in Brian Barto's and John Swift's testimony: Three men. There is no question about that. They all agree on One of the men was shorter than the other two. Even John Henderson said that. And the People produced John Henderson. We knew he couldn't identify him. We haven't failed to disclose one bit of available evidence to you jurors because this is the function of the District Attorney's office, and this is the function of any prosecutor, to present all the evidence to the jury. And we have presented all of it. They all three of them agree there were three men. One was shorter than the other, Two of the boys say the shorter man was this man, and you have seen them walk into court and walk out of court. What is he, five-eight, five-nine? He is not a tall man. Two of the boys said Sebastian Rossilli was the shorter man. The difference in the description of the clothing is very simple, as I

say, like if all twelve of us go to the window and a car passes by. Somebody is going to say it's a Chevy, somebody is going to say it's a Ford, somebody will say it's black, somebody will say it's blue, and there is always one fellow on the jury going to say, 'Well, I didn't know what kind of a car, but there was a blonde driving it." Everybody looks for something different, and it's true when you get twelve people looking at the same object you are going to get different color clothing, you are going to get different color ties. There is no question of that. But the fact remains that both of these boys with absolutely no reason to lie -and these boys are old enough to understand the gravity of their testimony. They are old enough to understand the extent of what the purpose and what the effect of their testimony will have. These young boys got up there. And was Frian Barto scared? You bet your life. He had never been in a courtroom before, and he was scared to death up there. He had a highly competent defense lawyer cross-examining All he knew is, "Look, I looked at that man's

face. That's the man." He said it yesterday, he said it on the day of January the 11th, and his testimony is unimpeached in this respect: When he looked through that door at the lineup nobody said to him, "Hey, Brian, there is Rossilli over there. Point him out." He said of his own volition that nobody encouraged him, nobody suggested to him. He said, "That's the man, Sebastian Rossilli." He didn't say, "Sebastian Rossilli," but he pointed out this man. And at the time that he did it he wasn't with John Swift, and he wasn't with Billy Henderson.

John Swift tells you the same thing. He looked at the face, and he said, "That's the man," and he said it to you here. Is that boy lying? Are two out of these three boys mistaken? Would they go through what they had to go through on the witness stand?

Mr. Weinberg a ked a question of John Swift:
"You are quite impressed with police, aren't you?"

John Swift said, "Yes, sir." Well, thank God in the
year 1967, we have a teenage kid who has got the guts

enough to say that he doesn't hate the fuzz, or, doesn't hate the cops but is impressed with law and order, and I tell you he told the truth --

I withdraw that last remark, your Honor, if I may.

THE COURT: Yes, I will instruct the jury to disregard that.

MR. DOOLITTLE: Gentlemen, in the heat of argument sometimes we lawyers give our personal views. My personal views are of no value to you. I have no personal views, gentlemen.

I think that will correct it, your Honor.

Now, let me say this to you, gentlemen: We have the testimony of William Brown before you, and this testimony is substantive proof. This is testimony under oath subject to cross-examination. Mr. Brown in the courtroom looked at Mr. Rossilli, and he pointed him out, and he said, "This is the man that was pointing a gun at me," and there was no doubt, there was no hesitation, there was no qualification. "That's the man," he said.

MR. WEINBERG: Your Honor, I have to object to

this now, your Honor, on the ground that the District Attorney was not present at that hearing, and if it be substantive proof that's been introduced here, since I did not have the right to cross-examine that document, and since I wasn't present, the sole thing that the District Attorney can do is not to characterize what was done in the courtroom, because he wasn't present, but to read from the document.

MR. DOOLITTLE: Well, your Honor, he was represented by Mr. Germaise. The Court has ruled on this, and it is admissible as substantive proof, and I think the Court knows Mr. Germaise is one of the finer attorneys in Nassau County.

THE COURT: Mr. Germaise's ability is not before us. We have had no evidence as to his ability.

I instruct the jury that that's not to be considered by them. He is an attorney duly licensed and appeared in the court at that time. The transcript is testimony of what happened, which is admissible evidence. It has been received and the jury is entitled to consider it. Mr. Doolittle can

comment upon it but, of course, I think it goes without saying the jury realizes that Mr. Doolittle wasn't there and didn't see what he is referring to.

MR. DOOLITTLE: I read from the testimony of Mr. Brown at the felony examination before the Honorable Judge Lockman when this defendant, Sebastian Rossilli, was in the courtroom:

"Q And that man that was holding the gun to your face, is he here in court today?

"A Yes, he is.

"Q Would you point him out?

"A That's the man there.

"Q Would you point him out?

"A That's the man there (indicating).

"Q You are actually sure that is the man?

"A I am absolutely sure."

Mr. Laurie, the District Attorney, said, "Your Honor, I request that the man pointed out be identified.

"The Court: All right. Will you please rise, and will you please identify yourself?"

Mr. Rossilli then rose and said, "Sebastian

J. Rossilli."

The court said, "Thank you, you may be seated."

A question of Mr. Brown: 'Q You are
absolutely sure that was the man?

"A I am sure that's the man."

Now, that was on February 1st -- February 24th, rather.

MR. WEINBERG: February 5th.

MR. DOOLITTLE: February 5th.

MR. WEINBERG: 1965.

MR. DOOLITTLE: There was no mention, gentlemen, and you may, of course, have this reread to you at any time you want -- but there was no mention prior to the defense attorney cross-examining Mr. Brown as to whether or not he had made any prior identification prior to the felony exam. But on cross-examination by Mr. Germaise these questions and these answers were given by Mr. Brown, and this is the testimony. This is before you:

"Q When was the first time you saw the defendant after that incident on the stoop?

"A February 1st.

"Q Where was that, Mr. Brown?

"A Over in Brooklyn in the hallway of the court building.

"Q What were you doing there, sir?

"A I was picked up by the detectives.

"Q Yes.

"A To come over to this courthouse. They said they had picked up a fellow in Brooklyn on a robbery, and they wanted to see if I did know the fellow. So on the way going to the courthouse I saw this fellow in the hallway of the courthouse. So I said to the detective, I said, 'This is the fellow. (indicating)'.

"Q That was last Monday?

"A That's right.

"Q Was the fellow pointed out to you as the fellow?

"A No, he was not.

"Q You picked him out in the hall?

"A I did.

"Q And did you see him after that?

"A Did I see the fellow after that?

"Q Yes.

"A I didn't see him no more from that day up until this day."

Now, gentlemen, you have got three positive eyewitnesses that this defendant was in Bay Boulevard in Atlantic Beach on January 11th. The only testimony you have before you that he wasn't there is that of his mother-in-law and that of his wife. Now, gentlemen, I don't think I have to comment too much on that. Both of these ladies admitted that they love this defendant. What would our wives do under similar circumstances? Well, I would certainly hope that they might testify. But you have got to look at these witnesses and see what interest they have, if any, or whether or not they were completely frank with you on the stand.

Let's take the testimony of Mrs. Peratto, the mother-in-law. I asked her very clearly. She said she never discussed this, the facts, with her daughter. They never went over this together. Do you recall that? Never at any time discussed it with her daughter. Her daughter, who was outside and didn't know that I had asked her that, evidently said, "Oh,

many times. On many, many occasions we sat down and discussed it." And you bet your life they did. Why? The stories jibe like two witnesses can't. You know, there is one thing about the truth when a group of people are telling it, more than one person. There has got to be inconsistencies because nebody sees things in identically the same way. Nobody's eyes are focused exactly on the same point at the same given point of time. So that there are going to be variations. I say those variations, whether they be to attire, as to clothing, as to mannerisms, if they all jell up to lead to one central fact, gentlemen, they equal the truth. But when stories are so pat -- this particular morning they both recalled that he was in bed at 8:15 in the morning. They both recalled that she was sleeping on the couch, they both recall that at 11:15 Dr. Tester came.

Now, Mr. Weinberg said something in his summation, and I remind you of this, gentlemen: that what Mr. Weinberg said is not testimony, nor is what I say testimony, but he said, "If there was any other witness who saw the defendant on that day and remembered it, he would have been here." There is no testimony that anybody did not remember what happened on that day. That's Mr. Weinberg testifying, and he wasn't under oath, and he wasn't on that witness stand.

Now, the wife herself admitted that she had received subpoenas from the District Attorney's office to come up and talk to the District Attorney and tell us at least what the alibi was, and that when she was served with a subpoena she told the process server she wouldn't come on advice of counsel. You heard this alibi for the first time today, gentlemen, and so did the District Attorney's office.

MR. WEINBERG: I must respectfully object at this time, your Honor.

MR. DOOLITTLE: It's true.

MR. WEINBERG: That on the date of September 29, 1966, there was served upon the District Attorney's office a bill of particulars which sets forth the defense of alibi and sets forth the time set forth in this bill of particulars.

MR. DOOLITTLE: I concede that, your Honor.

THE COURT: Well, that is correct, is it not,

Mr. Doolittle?

MR. DOOLITTLE: I concede that, and that subpoenas were served pursuant to that alibi on Mrs. Perratto and Mrs. Rossilli.

THE COURT: I think the objection is made to what was understood to be your statement that the first time the District Attorney heard of the alibi defense was today or yesterday.

MR. DOOLITTLE: No, heard the alibi.

THE COURT: Well, let's clarify that. Do you mean heard what the alibi was?

MR. DOOLITTLE: I think I said that the first time we heard what the alibi witnesses said was today when the jury heard it, and there was talk about a Dr. Tester, whom I think Mrs. Rossilli and Mrs. Perratto said had not been subpoensed.

Now, gentlemen --

MR. WEINBERG: That's objected to, your Honor.

MR. DOOLITTLE: I think that was the testimony on cross-examination.

MR. WEINBERG: There was no testimony to that.

THE COURT: All right. We will instruct the jury that it is the jury's recollection of what the witnesses said that controls, and if you want any portion of the testimony read back, including this portion that we are talking about read back to you, I will make it available to you.

MR. DOOLITTLE: Again I say, gentlemen, if
my recollection clashes with yours, it is your
recollection that counts. If you don't have any
recollection, gentlemen, you have an absolute right
to have any of the testimony read back. It is my
recollection that either Mrs. Perratto or Mrs.
Rossilli, I don't know which one, said that Dr.
Tester had not been subpoensed.

Now, gentlemen, you know there is just so much you can talk about, and I don't want to put you to sleep. It is getting to be twenty minutes to 4 now. I think I would insult your intelligence to go on and start repeating the same thing over again, but, as I say again, this is a simple case. It is a question of whom you believe, and in judging whom you believe I ask you again to take into consideration

the overriding factor of which of the witnesses, the People's witnesses or the witnesses for the defense, have an interest in this case. I think the answer is obvious, gentlemen.

I merely ask, gentlemen, that in your deliberations you give the attention that you have given to the case, that you have given to Mr. Weinberg, that you have given to me, which I know you will give to the Judge and his charge.

I say that with all the proof in -- I told yo initially I would prove that this defendant committed these crimes on January 11th. I can't tell you what verdict to bring in, gentlemen; it is not the function of the District Attorney. It seems on T.V. the function of the District Attorney in Perry Mason when Mr. Hamburger pounds away and says, "You must." You must do what you will do, gentlemen. You must do what your good common horse sense says to do.

I say it is the People's impression here that with the entire case in that the guilt of this defendant, and the fact that he was in Bay Boulevard in Atlantic Beach, has been proven without any

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question -- not beyond all doubt as Mr. Weinberg said -- but beyond a reasonable doubt; beyond a reasonable doubt. And if you find that so, gentlemen, you must come in with a verdict of guilty.

Gentlemen, I have no more to say. I thank you for your attention. I thank you for the time that you have given to this case, and God speed you to a just and a true verdict.

Thank you.

THE COURT: Gentlemen, we will recess until tomorrow morning when you will have the charge.

Please don't discuss the case among yoursalves or with anyone else. Please don't form any opinion or express any opinion until the case is submitted to you.

Will you follow the attendant, please. Good afternoon.

(Thereupon the jury withdrew from the courtroom.)

(The following occurred in the absence of the jury:)

MR. WEINBERG: Your Honor, at this time I would like to make a motion.

THE COURT: All right.

MR. WEINBERG: I at this time, your Honor, must move for a mistrial on the ground that on four different occasions the District Attorney stated in his summation to the jury that "It is a question of which witnesses you believe." Now, this is not the law. This is so highly inflammatory and places the nature of some burden upon this defendant so as to place in the minds of the jurors to weigh one side against the other. I say that it is impossible at this time, including his Honor's charge to the jury tomorrow, to take this impression out of the minds of the jurors, that they now are in a position where they must level one side as against the other predicated upon this statement which was said in this summation on four distinct times. On that alone I say it is so inflammatory in the minds of the jurors as to warrant a mistrial.

MR. DOOLITTLE: I think it is a very simple question, your Honor. If they believe the defense of alibi they must acquit. If they believe the People's witnesses and they don't believe the alibi, I think this is their function. This is solely their function.

I can't see any error in this whatsoever, your Honor.
This is always the function of a jury.

MR. WEINBERG: Your Honor, may I say this: "THE COURT: Do you want to speak on further?
MR. WEINBERG: Oh, surely, your Honor.

If the defendant had rested without putting any witnesses on the stand it is still -- the burden has not shifted to the defendant. At any point it is still up to the People to prove their case beyond a reasonable doubt. I made it crystal clear in my summation that if I didn't put these two witnesses on the stand that it was still incumbent upon the People to prove their case beyond a reasonable doubt.

Now, your Honor, I don't have the books here today, but I can tell you this off the top of my head: that -- and I believe the case is People v. Egnor in the Court of Appeals, 302 N.Y., and I am going back many years, which held that although the burden may shift from the People to the defendant in coming forward, the burden of proof upon alibi is upon the People beyond a reasonable doubt.

THE COURT: No question about that.

MR. WEINBERG: Now, I will also state -THE COURT: There never has been.

MR. WEINBERG: These are lay people who are sitting on the jury, your Honor. What Mr. Doolittle has done in his summation is to equate apples with potatoes. He has set forth that if they believe Mr. Barto, Mr. Swift and Mr. Brown -- they have nothing to do with this -- and they don't believe these other people, I say, your Honor, this case could easily be dismissed, or a jury could come in with a verdict predicated upon the fact that the identity of this defendant has not been established beyond a reasonable doubt whether anybody took the stand, and I say that Mr. Doolittle has placed in the minds of the jurors a very, very serious problem. They are going to equate the testimony of these two women, Mr. Perratto and Mrs. Rossilli, as contrasted with the three witnesses who identified this defendant. I say that by doing that -- and they must have heard this District Attorney because he said it on four different occasions, because they were very attentive and listened rather well -- no matter what your

Honor charges tomorrow, this will be inculcated in their minds, and they cannot disgorge it.

THE COURT: Well, let's see if we can pin this down a little. What is inculcated that you object to? You seem to be referring to equating the testimony of one against the other; is that what you are talking about?

MR. WEINBERG: Not only equating.

THE COURT: It seems to me they have to equate testimony when it conflicts, don't they?

MR. WEINBERG: They don't have to equate the testimony at all in this particular case. All they have to do in the original part of this case is to state whether or not in their minds as reasonable people they have found that the testimony of the People, not having made out a prima facie case --

THE COURT: Well, if you are directing yourself to a prima facie case, that is one thing.

MR. WEINBERG: No, I am not on the prima facie case but, beyond a reasonable doubt, on the People's own case they don't have to go into the testimony of the two alibi witnesses.

THE COURT: Well, that's true.

MR. WEINBERG: But that is not the way it was summed up to the jury, your Honor.

THE COURT: Well, I will give you an opportuni for a request to charge if you want it.

MR. WEINBERG: I would say that would be insufficient, but I will still except and state that the statements are so inflammatory as to place this in the mind of the juror, but I still will ask for a request to charge the jury on that point.

THE COURT: Now, I would like you to have that for me as soon as possible. When can you have it?

MR. WEINBERG: I am in the following position, your Honor: I am a New York City practitioner, and I do not have the books. I will have to go back to New York. I will have to --

THE COURT: There is a library right down the hall here.

MR. WEINBERG: Well, what I would like to do, if I may go back -- would it be all right with you if I brought that in at 9:30 tomorrow morning?

THE COURT: Yes, that would be all right.

MR. WEINBERG: Fine.

THE COURT: And I will ask you both for any other requests that you have to charge by 9:30 tomorrow morning in writing.

MR. WEINBERG: I am under the -- would it be perfectly all right if I handwrote these requests to charge? I do not type.

THE COURT: Yes, that will be all right.

Now, I want to have the minutes of the felony examination from somebody.

MR. DOOLITTLE: They are in evidence. This is the only copy I have.

MR. WEINBERG: I have another copy.

THE COURT: Well, I can use the copy that's in evidence; thank you.

Now, I have a note from the jury which I will read to you, and which you heard me make reference to before: "Please explain reference to Elmor as referred to by defense attorney because Juror No. 12 could not understand connection with case in question."

MR. WEINBERG: That's with regard to the

burden of proof, your Honor, and I will give your Honor a statement with regard to that. That is in one my requests to charge, also.

THE COURT: Well, I want to find out what case you were referring to.

MR. WEINBERG: I will give that to you now in one moment, if I may.

THE COURT: Yes.

MR. WEINBERG: 227 N.Y., 397, I believe, is the citation, your Honor.

THE COURT: How is it spelled?

MR. WEINBERG: E-1-m-o-r-e. If you will bear with me for one moment, your Honor, I will find it in Richardson.

MR. DOOLITTLE: Was it 227 N.Y.?

MR. WEINBERG: 227, I believe, it is, N.Y. but there is a later case in 302 N.Y.

May I just read this to you, your Honor. This is Section 102 of Richardson on Evidence.

MR. DOOLITTLE: Which edition?

MR. WEINBERG: This is the ninth edition, the latest edition. The following is set forth at page 78:

THE COURT: Well, as I say, there is no question on that.

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MR. DOOLITTLE: There is no question about that.

THE COURT: I don't think that ever has been contested.

MR. DOOLITTLE: I never did contest that, your Honor.

THE COURT: So I would charge that as a matter of course that the burden of all issues is on the prosecution beyond a reasonable doubt.

MR. WEINBERG: Including the defense of alibi as the way I would like it written.

THE COURT: Yes, if you wish it specified I certainly will do that.

MR. WEINBERG: Yes, I do.

THE COURT: All right, I will see you at 9:30 tomorrow morning with your requests to charge.

(An adjournment was taken.)

COUNTY COURT : NASSAU COUNTY

PART IV

THE PEOPLE OF THE STATE OF NEW YORK :

-against-

SEBASTIAN ROSSILLI,

: Ind. No. 20991

Defendant.

Mineola, New York January 20, 1967

fore:

HON. DOUGLAS F. YOUNG, County Court Judge, and a Jury.

(Same appearances as heretofore noted.)

THE CLERK: People v. Sebastian Rossilli, continued.

(The following ensued in the absence of the jury:)

MR. WEINBERG: If it please the Court, at this time the defendant would like to renew and embellish, if he may, his motion for a mistrial on the basis of

the summation of the prosecutor on the following bases: The prosecutor on four different occasions stated, 'Whose witnesses do you believe, these two boys or the defendant's?" It is respectfully submitted that this language falls within the ambit of the case of Teople v. Russell, which is cited at 266 N.Y., 147. In that case the defendant witnesses testified that the defendant at the time of the crime was at a different place. In weighing the testimony the jury was called upon to consider the possibility of mistake on the part of the People's witnesses and the possibility in that case of fabrication on the part of the defendant's witnesses. There was no independent proof of fabrication in that case. There is none in this case. The jury could infer fabrication only if it found that the testimony of the People's witnesses who identified the defendant was true. The disbelief of the defendant's witnesses would be the inevitable result of belief of the People's witnesses. It could not at the same time be corroboration of the People's witnesses. An honest defendant may fortify his denial

of the charge against him by other evidence which, if accepted, would demonstrate the falsity of the charge without thereby subjecting himself to the suspicion that his denial is false and the evidence produced by him fabricated. The burden of proof of guilt beyond a reasonable doubt may never be shifted from the People to the defendant. The presumption of innocence continues throughout the case.

I respectfully state that the characterization given by the prosecutor in this matter falls within the ambit of not only that language but the language of United States v. Bozza at 365, Federal 2d, 206 at page 215 where the court held, "Not even appellate judges can be expected to be so naive as really to believe that all twelve jurors succeeded in what Judge Leonard Hand aptly called a mental gymnastic which is beyond not only their powers but anybody's powers; citing Nash v. United States, 54 Federal 2d, 1006.

On this basis I submit --

THE COURT: Well, excuse me. You have just stated something that is a general proposition.

MR. WEINBERG: That is what I am going to get to.

THE COURT: All right.

MR. WEINBERG: I appreciate that, your Honor.

On the foregoing bases, which are general propositions of law, I maintain that no matter how the charge to the jury is stated, no matter how cogent the charge may be, it will be impossible for the jurors to take out of their minds this weighing of the evidence of witnesses on both sides as was set forth by the prosecutor in this case. I maintain that that alone is sufficient for a mistrial.

THE COURT: Well, you didn't answer my question.

You have cited me a case and read me an excerpt from
it which, as I say, is a general proposition that
the jurors can't be expected to excise something
from their minds, but you didn't tell me what the
facts of that case were and what it applies to.

MR. WEINBERG: It applies to a criminal prosecution where --

THE COURT: Well, does it have anything to do

with this point?

MR. WEINBERG: Yes, it has everything --

THE COURT: With the specific point that you are urging?

MR. WEINBERG: The specific point is this: that the prosecutor in this case has set forth on four different occasions that you either take the testimony of one set of witnesses or of the other set of witnesses. Now, that is not the law.

THE COURT: Well, why don't we do this: You give me whatever request to charge you think is necessary to overcome this, if it could be overcome. You are not admitting that it could be overcome?

MR. WEINBERG: No, I say it cannot be overcome
THE COURT: How would you like it corrected if
it could be corrected?

MR. WEINBERG: In two different areas: that
the prosecution must prove its case beyond a reasona
doubt as far as its case is concerned --

THE COURT: Right, we are all agreed on that.

MR. WEINBERG: -- that once the issue of alibi
is raised it is incumbent upon the prosecution to

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prove the defense of alibi did not exist beyond a reasonable doubt.

THE COURT: We all agree on that.

MR. WEINBERG: Number three, that the People's witnesses are not to be equated with the defendant's witnesses as to truth or falsity, but that the People's witnesses must stand by themselves and prove the case of the People beyond a reasonable doubt, and that if in fact the defendant's witnesses are not telling the truth, your Honor, that that is insufficient for the People to prove their case beyond a reasonable doubt unless in fact the People have proved their case beyond a reasonable doubt.

THE COURT: Well, I think that if we do this
you are going to achieve the result of confusing the
jury on the issues rather than aiding them. I don't
find anything wrong with your proposition that the
People's case has to be proven by their witnesses
beyond a reasonable doubt. That is the first step,
and until that is accomplished, then there is no
defense to be considered. That is your point, isn't
it?

MR. WEINBERG: I appreciate that --

THE COURT: And then if the defense is considered, the People still have to bear the burden of proof beyond a reasonable doubt as to overcoming the defense, right?

MR. WEINBERG: Accurate, your Honor.

THE COURT: Now, isn't that a simpler way of putting it?

MR. WEINBERG: Yes, your Honor, but in view of the type of summation, how can you exculpate from the jurors' minds what was said to them about the witnesses? That was not how the prosecutor summed up. Had he summed up that way, your Honor, I would have no objection. I think if your Honor would have the stenographer read back to your Honor what was set forth in the summation with regard to the balancing of witnesses, I think your Honor would first appreciate, if I may say so, and I don't mean to be presumptuous, that it will be impossible for the jurors to dissect this and put it in its proper perspective as your Honor has set forth.

THE COURT: Well, I have more faith in jurors following instructions, perhaps, than the judge who

wrote the opinion in the case you read has, or than some other people. But I will make a specific statement as to the burden of proof on the People's case and as to their being no requirements that they consider the truth or falsity of the testimony of the witnesses for the defense until the People have made their case beyond a reasonable doubt by their witnesses.

MR. WEINBERG: I can't expect you to do more than that, your Honor, as far as the charge is concerned.

MR. DOOLITTLE: Your Honor, I have, of course, no objection to the fact of the Court charging that I have the burden of proof in all respects as to affirmative proof and as to the defense. However, your Honor, would the Court instruct the jury that that doesn't necessarily mean that the People have to put on rebuttal witnesses per se? When you get into the burden of going forward to prove or disprove the defense, your Honor, this leaves the jury with the impression of, 'Well, he should have produced other witnesses, and if he didn't, then he hasn't

met the burden of going forward." Now, this is
the implication that I think Mr. Weinberg's request
would leave with the jury as to the burden of
disproving the alibi. We can disprove the alibi
by doing nothing further than resting on the People's
case per se.

THE COURT: All right, we will add that to it, also.

MR. DOOLITTLE: Fine.

MR. WEINBERG: Well, I am against that specific charge, your Honor. I know that the law is accurate in what Mr. Doolittle had said, but I am against the specific charge of that unless I know the framework of the charge.

THE COURT: Well, we will prepare something and then we will take it up.

MR. WEINBERG: Now, may I at this point, your Honor, renew --

THE COURT: Go ahead, Mr. Weinberg.

MR. WEINBERG: -- my second motion, your Honor.

THE COURT: Well, first let me dispose of your first motion by ruling on it, and my ruling is that I

will make a charge which I think, if there is anything misleading about the comments that Mr. Doolittle made in his summation, will adequately give the principles of law to the jury.

MR. WEINBERG: Respectfully except, your Honor.

THE COURT: All right.

Now go ahead.

MR. WEINBERG: My second motion, is to have the jury determine as a matter of fact whether the prosecution exercised due diligence in trying to locate the witness William Brown, or whether in fact the People tried not to find the witness William Brown, taking into consideration the nature and type of testimony that was adduced by the prosecution upon the trial of this matter. That is my second motion.

THE COURT: I will deny that application on the ground that the determination of the admissibility of evidence is for the trial court to make in its discretion and that a hearing was held out of the hearing of the jury prior to the commencement of the trial for this specific purpose and with the

concurrence of both counsel that it be prior to the trial and out of the hearing of the jury, and on that basis the issue has been disposed of by the Court.

MR. WEINBERG: My third motion, your Honor, is to have the jury determine as a matter of fact whether the prosecution exercised due diligence in trying to locate the witness Mary Barsh, or whether in fact the People tried not to locate the witness Mary Barsh, taking into consideration the testimony that was adduced upon this trial.

THE COURT: I will deny that request.

MR. WEINBERG: Now, your Honor, at this point I would ask that your Honor -- one other thing came to my mind, which is a minor thing. In summation, Mr. Doolittle stated yesterday that on January 11, 1965, the witness William Brown identified this defendant. I know that he was in error in making that statement as to January 11th, because in truth and in fact on direct examination it was first February 1. Would your Honor instruct the jury that the date of the first time that the witness William

Brown identified this defendant was February 1, not January 11th, the date of the crime?

MR. DOOLITTLE: Your Honor, he identified him at the scene of the crime. I mean, that was my statement, that he saw him and identified him right then and there as he was running down the street.

Maybe my choice of language wasn't too good when I said "identification." If the Court wants to correct that to say that Barto did not identify him on that date, but he saw him on that date and subsequently identified him, your Honor, I would have no objection, but I think that was an error in terminology.

MR. WEINBERG: Right, I agree.

MR. DOOLITTLE: But I don't think the Court at this point --

THE COURT: Well, I certainly don't want to go into a succession of corrections on statements that either of you have made because there would be a number of them that could be rephrased perhaps.

MR. DOOLITTLE: I would object to the Court doing that, your Honor.

THE COURT: Go ahead, Mr. Weinberg.

MR. WEINBERG: Now, there are three charges that I request your Honor to charge. They are as follows: Where identification is at issue as in the case --

THE COURT: This is part of your requests to charge, I take it?

MR. WEINBERG: Right.

Brown read into evidence by the prosecution is not to be accepted with the same weight as that of other witnesses who testified before you upon the actual trial of this case in that, A, you did not see the witness and, therefore, you did not hear him and judge his demeanor and inflections on the witness stand; B, the cold, printed record is not a substitute for hearing and seeing the witness; C, in the light of the context of the testimony of the witnesses Barto and Swift, this defendant was unable to cross-examine the witness Brown.

THE COURT: Well, as to that last one, Mr. Weinberg, I don't know what "in the light of the

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is

context of the testimony of the other witnesses" has to do with it.

MR. WEINBERG: It has the following to do with it: At the time that the felony hearing was conducted Mr. Brown testified as the sole identification witness, period. Thereafter, Brown was not brought to this courtroom. Two witnesses testified here as to identification. I did not know that these two witnesses existed until the day of trial. I did not know that Brown would not be brought to this courtroom until the day of trial. Therefore, this defendant has been denied the right to properly and effectively cross-examine a key material witness after or before the testimony of other witnesses who allegedly saw this defendant. I maintain that there has been an improper -- strike that -- that there has been ineffective cross-examination or ineffective defense by this defendant predicated upon the fact that he has been denied rights of cross-examination after --

THE COURT: All right, I understand your point.

MR. WEINBERG: All right.

THE COURT: But I would comment on it that,

called before William Brown, had testified and been cross-examined, and then William Brown had been called, you would have had a similar problem in that you would be examining -- well, no. Let me put it the other way. Assuming William Brown had been called first at the trial, you had examined him, and then the other boys had been called, you would have had a similar problem with respect to the testimony of William Brown. You still wouldn't have known that these other witnesses were being called.

MR. WEINBERG: Not necessarily so, your Honor.

I could have also called William Brown back on the stand after that.

THE COURT: You could have, but I think it him highly unlikely you would call/as your own witness.

MR. WEINBERG: Except for one factor, your Hono
The People are the ones who are presenting this case
This is a highly unusual case with regard to the
fact that nobody has testified except William Brown
as to a physical being in this apartment by this
defendant, no one.

THE COURT: I will deny that request, also.

I will cover that by the instruction to the jury
as to how they appraise the testimony of the witnesses.

MR. WEINBERG: Respectfully except.

Now, the other precise charge that I would like, your Honor, is the following: that the defendant is entitled to the benefit of a reasonable doubt applies not only to the case as made by the prosecution but to any defense interposed.

THE COURT: I will charge that in substance, possibly not in your exact language, but this will be charged.

MR. WEINBERG: I would just like to add the second sentence, if I may.

THE COURT: All right, you may.

MR. WEINBERG: The defense, having raised the issue of alibi, the prosecution has the burden of proving beyond a reasonable doubt that the alibi is invalid.

THE COURT: As I said, in substance this will be charged.

MR. WEINBERG: And my last request to charge,

your Honor, is with regard to what is a reasonable doubt. I know your Honor has many charges as to what may be a reasonable doubt, and I am asking that because of the very nature of this case that included in the charge for a reasonable doubt there be added the words "with a moral certainty."

THE COURT: That phrase will be used in my charge in connection with the part concerning circumstantial evidence, but I will not apply it to the definition of reasonable doubt.

MR. WEINBERG: No other requests, your Honor.

THE COURT: Do you want to come up to the bench, gentlemen? We will take this off the record.

(A discussion was held at the bench off the record.)

THE COURT: Gentlemen, I propose to let the jury take the exhibits in with the exception of this exhibit, the testimony of Mr. Brown. If you want to have anything to say on that I will give you an opportunity to be heard. Is there anything you want to say about having them take the exhibits to the jury room with them?

MR. DCOLITTLE: No, but will the Court make it

known to the jury that they can always have that reread to them?

THE COURT: Reread, yes.

MR. DOOLITTLE: Thank you.

MR. WEINBERG: As I understand it, then, your Honor, this will be not be going into the jury room, Mr. Brown's cross-examination?

THE COURT: This will not. The other exhibits, if they request them, will be going in.

All right, bring the jury in.

(Thereupon the jury entered the courtroom.)

THE CLERK: People v. Sebastian Rossilli.

Roll call of jurors.

(Jury roll taken.)

THE CLERK: Jury all present, your Honor.

THE COURT: Good morning.

THE CLERK: There will be no manner of movement during the charge of the Court. Anyone wishing to leave must do so now.

CHARGE OF THE COURT

THE COURT (Young, J.): Gentlemen, we are ready now for the phase of the trial where I will instruct you in the law which is applicable to the case. In other words, charge you on the law, and I am going to first do what is known as marshaling the evidence. This entire charge is probably going to take a fair amount of time. I think perhaps we will break in the middle of it -- not for you to leave the jury box, but just to take a moment to stand up, if you wish, and stretch your legs.

I mentioned marshaling of the evidence. This simply means reviewing the evidence, gentlemen, and I am going to give you a sort of a summary of what you have heard, and I stress the fact to you that I am not in any way attempting to lead you or guide you as to your findings on the facts. As you have already heard, this is your province as the jury, and you have heard it a number of times. What is said to you about the evidence either by counsel or by myself is not controlling on you, and it is your recollection of the evidence and the testimony which

I might say preliminarily that if there have been any conflicts in your recollection between what the attorneys said, of course, you should accept your recollection. If you have any doubt you always have the opportunity of making that known and returning to the jury box to have the transcript of the testimony read back to you so that you can resolve those doubts.

I will charge you that if there has been any intimation by either counsel to the effect that he was vouching for the credibility of the witnesses that this is not to be accepted by you because this cannot be done by either counsel. He simply presents the witnesses, and he cannot indicate to you in any way that based on his personal integrity he is vouching for their credibility.

In the testimony that you have heard you will recall that our first witness was Mrs. Marcus, and she described to you the fact that she was the housewife at the home at 239 Bay Boulevard in Atlantic Beach, and was present there on this date in January of 1965,

when the incidents occurred. She described to you that she saw a man walk up the walk of her house. This was a day in January, it had been snowing, there was snow on the ground, and he was dressed in something which she thought looked like a United Parcel delivery man's uniform. The storm door was closed, and he told her that he had a package for Mr. Marcus, and after some inquiry she opened the door and he pushed his way in, and he seized her, dragged her into the living room, threw her on the floor face down. She stated that the man who did this was not the defendant. Subsequently, two other men came into the premises, and then this man picked up Mrs. Marcus, according to her testimony, and sat her down on the chair, he took a knife, put it to her face and told her that she had to tell him where her safe was or he would cut her to ribbons.

One of the men who had followed into the house seized the maid, Mary Barsh. The other went upstairs Mrs. Marcus testified that she could not identify any of these men. She was, as she testified, in great terror, and she told the man who had threatened

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her that she would show him her jewelry. He took a gun, and he walked behind her. A man whom she described looked like an apparition with a hat on, it was like a shadow, ran down the stairs, and then this man who was holding the gun on her took her to the landing and tied her up with adhesive tape.

While this was going on another man was holding a gun to Mary Barsh, and Mrs. Marcus described the gun as a hand gun, dark, with a long nozzle. She stated that items of jewelry were taken from her person. She was wearing an 8-carat square-cut diamond ring, a wedding ring and a pinkie ring that were all taken. She stated that the diamond ring was a \$15,000 ring, and she had a \$20 bill in her wallet which was taken, and that was what was taken from her person.

Thereafter she described a bell ringing and a lot of commotion, something about an aspirin, and then she heard a lot of voices outside yelling.

She heard Mary, the maid, screaming in the street, and then people came in, she was released, and she looked in the place where her jewelry had been kept

and all the jewelry which had been kept in this bag was missing; a double string of pearls with a diamond clasp, a pin, a bracelet with a diamond clasp, a diamond pinkie ring and some gold pieces which she stated were not insured, and she testified that the insurance company paid her \$25,000 for her loss from this robbery.

On cross-examination she stated that as to the man who was holding Mary, the maid, captive at the time she saw his shoes and a long coat, and he wore a stocking over his face.

We then heard from Brian Barto, who told you that he is a student, that on the date in question he was with two friends, from whom you also heard, that he was walking down the street in Atlantic Beach, that they had been shoveling snow, that they were in the middle of the street, that he saw three men running toward him, they ran by around and by the boys and around the corner. He heard someone say "Stop," and he turned around and went to the corner and saw these men get into a car and drive off. He was asked if he could identify anyone in the courtroom as one of the men, and he identified the defendant,

and he stated there was no doubt in his mind.

On cross-examination he stated that the man on the left had a coat, that the man in the middle had a black coat on and one had a hat on. He did not see the face of the man with the black hat, he didn't see the man on the right, and he only saw the man in the middle. He didn't remember whether this man had a scarf on. He was asked how long it took for them to run by him, and he said it was just a matter of seconds. And as to the man in the middle, he didn't see his face very long, just a couple of seconds. He said he had black hair, and he did not know if he had a scar, he did not know if he was clean-shaven or had a beard. He stated again on cross-examination that thethree men were wearing long coats, that he thought the man on the left had a long gray coat, the man in the middle a long black coat and the man on the right a grayish coat. He stated that he only saw one man, the man in the middle, that he was the shortest man of the three, that he couldn't tell what the man on the right looked like. As to the man on the left, he only remembered that he

was tall and had a hat, and he stated the man in the center was short and had black hair, and he saw his face.

On redirect examination he was asked if he had ever seen the defendant in person again, and he said that he had seen him at the police station. He said he was in a lineup, and that he identified him at the lineup by picking him out.

We then had the court reporter, Mr. Friel, who established the foundation for the testimony of William Brown, which you had read to you taken from the felony examination which was held at an earlier date in 1965. I will interpolate here, gentlemen, that you will be permitted to take the exhibits which have been admitted in evidence into the jury room with the exception of the transcript of the testimony of William Brown, and there is a reason for this, for excluding this, which is that sometimes there is a tendency to give greater credit to things which are typed or in printing than to things which are heard by the ear, and to avoid any possibility of this happening we would not have you take the transcript in

have it reread to you upon request.

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The transcript of the testimony of William Brown: He stated that he went over to the house in question on January 11, 1965, which was across the street from the house in which he was employed as a chauffeur, that he went to the door and the maid, Mary, came to the door with water running out of her eyes, and he asked for aspirins, and then she shut the door and went back in, and he rang and banged on the door, and then Mary busted right out in front of him and ran, that some fellow ran behind her trying to catch her, but she got away. Then the second man came out, had a gun in his face, and the second man held the gun to William Brown's face and said, "Don't move." He testified that he first thought this man was a detective. Then a third man came out, and he shot at Mary twice. Mary was then, as he put it, "making it to this woman's garage,"

by a house along on the same side of the street.

A third man, according to William Brown, told his partners, "Let's get out of here," and they left his standing there.

He was asked if at the hearing he testified that -- he was asked at the hearing if the man who was holding the gun to his face was in court at the time of the hearing, and he stated that he was, and he then identified Sebastian Rossilli, who was present at the hearing.

Now, on cross-examination he was asked what the first man that came out after the maid was wearing, and he said he didn't pay any attention to what he was wearing. He was afraid because he is afraid of detectives. As to the second man, who put the pistol in his face according to his testimony, his testimony was that this man was wearing a sport jacket, a sport shirt and a trench coat that had reversible colors in it, and he described that as a trench coat that when you get in the light with them they are a different color, and he said it was more of an orange color in the light. He testified that the sport shirt was yellow, and it was a regular sport jacket. He didn't pay any attention to the color,

except that it was a solid color. He stated that
the man was wearing a hat. When asked to describe
his face he said he couldn't tell you how it looked,
that it just looked the way it looks now, that he
was clean-shaven and did not wear glasses, and he
was about 5 feet 6-something in height.

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He described the gun as a dark or a blue steel revolver that the man was holding at him. As to the third man that came out, he didn't see his face because he didn't get a good look at it, and he testified that all three of the men were wearing trench coats. He testified that he had seen the defendant after the incident on January 11, 1965, on February 1st, in Brooklyn, in the hallway of the "Koat" building, that he had been asked by the detective and had been brought over to the courthouse for the purpose of attempting to identify a suspect, and in the hallway he saw this defendant and indicated him to the detective as the man who had held the pistol on him at the time of the robbery.

I point out to you in connection with the testimony of William Brown the fact that you did not

have an opportunity to see Mr. Brown or hear him in person inasmuch as he did not appear and, consequently, your impressions have to be necessarily limited to a transcript of his testimony which you heard.

You next heard from John Swift, who is also a young man in school, a senior at the Long Beach High School. He told you on the date in question he was walking in this area in Atlantic Beach, and he noticed people running. There were three men. He stated they were running in single file towards the boys, and that when they got to the corner of the street the boys were on opposite corners from these three men, that the men ran to a car and got into it, and he was asked if he could identify any of the men, and he identified the defendant here and stated that there was no question in his mind that he was the man in the middle of the three men. He stated that the comparison with the other two men was that the defendant was smaller and not as heavy. He testified further that at a subsequent date he was taken to the police station and asked whether he could identify a man who was in a lineup, that it was a lineup of a

total of four people, and he picked out, looking through a mirror, he picked out the defendant as the man he had seen, the middle man of the three on the date of the robbery. He picked him out from the lineup. He described the first man as being heavy set. He didn't remember if he had a hat. He believed he had a long gray coat on, and the third man he believed had a gray coat. He didn't remember if he had a hat. The first man was about 6 feet in height, heavy set, heavy build, overweight more or less, and the second was noticeably shorter than the other two and had on a black coat. He did not remember that anything was being carried by the men.

On cross-examination he stated that he had heard a gunshot before these men came toward him and the other boys, and he only heard one shot.

We then heard from William Henderson, who is
a young man of 19 years, and who testified that on
the date in question he was with the other two witnesses
in Atlantic Beach, had been shoveling snow, and he was
unable to identify any of the three men. He said
that the other two boys had run towards them, and he

didn't take any particular interest and was unable to identify them other than the fact that one was shorter than the other two.

You heard from Mrs. Freilish, who told you that Mrs. Marcus had moved to Florida, that Mrs. Freilish's mother had hired the maid, Mary Barsh, when Mrs. Marcus moved. Mary Barsh had worked about three days for Mrs. Freilish's mother, and then she disappeared, and she did not collect her wages, and she did not know where she is today. She had not been in contact with the District Attorney's office prior to the day before her testimony. She did not know whether any policemen or district attorneys had visited her house before this.

That completed the presentation of the witness for the for the prosecution. We next had a witness for the defense, Mrs.Perratto, who is the mother-in-law of the defendant, and she stated that she remembered the date of January 11, 1965, remembered it particularly because that was the date on which her son-in-law was arrested. About 6 o'clock at night she or her daughter had received a call that he had been arrested.

and she testified that she lived in an apartment on the first floor of the address on Mott Street, that the defendant lived in an apartment upstairs. She stated that her son-in-law was home all day until 3:45 in the afternoon, that she had seen him at intervals during the day. She first had seen him about 8:30 in the morning when she went to pick up her grandson to take him to school, that her son-in-law was in bed at that time, and she picked up her grandson around 11:30 -- I will withdraw that -- that she had to go back to the apartment at 11:30 in the morning because the doctor was coming to her apartment, and Dr. Tester came about 11:30. She went upstairs and called her son-in-law and told him that the doctor was there to look at her daughter's foot, and her son-in-law assisted her daughter downstairs, and then she went back to pick up her grandson from school, and she took him to lunch and then took him back to school about 12:45, went to her apartment and her son-in-law and her daughter were in her apartment, that her son-in-law was looking at television at that time. She said that she remained there until it was

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time to pick up the boy about ten of 3. About twenty after 3 someone called her son-in-law and left, and that was the last she saw of him on that date

On cross-examination she told you that she he been served with subpoenas and had not appeared at the District Attorney's office in response to the subpoenas, that is, to two subpoenas, and she was asked if she had discussed the subpoenas with her daughter. She said that she had not. She stated that Dr. Tester is still alive but he was not prese and she stated that Dr. -- well, we will pass that over. She stated that she hadn't discussed the details of the circumstances involving her son-in-labeling in her apartment on the day in question, that she hadn't discussed it with her daughter because it wasn't necessary since her daughter was aware of these things.

The defense then called Marie Rossilli, who is the wife of the defendant, as she testified, and she testified that her mother on the day in question, January 11, 1965, had come up to pick up her son to

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apartment, he was asleep, that Dr. Tester had come some time before lunchtime. The doctor was unable to come to the third floor and so her husband took her down to the first floor. The doctor examined her foot. She said that she and her husband stayed in her mother's apartment, and she did not have any visitors that day, that her mother returned and they had coffee together, and then she went out to pick up her son again to bring him back from school, and they came back about five or ten after 3, that her husband left some time after 3 when someone called him.

She was asked whether she had been served with subpoenas twice. She stated that she had been, and she stated that she had told the process server that she couldn't appear in response to the subpoenas because her lawyer told her not to appear. She stated that she had discussed the case with her mother and that Dr. Tester was not present because he was unable to come.

Gentlemen, you have already been told that the

fact that there is an indictment is not to be considered by you as constituting any evidence in the case, and it doesn't create any presumption of the defendant's guilt. Under our law every defendant who is charged with a crime is presumed to be innocuntil his guilt has been proven beyond a reasonable doubt. The indictment is simply the mechanics by which an accused is brought to trial.

You are the sole judges of the facts, as you have been told, and it is your recollection that you will rely upon, not what anyone else said. As I have told you, if you have any question as to what some of the testimony is or what some of the evidence is, you have the right -- or, for that matter, as to what my instructions have been -- you have the right to make this known to me and to return to the courtroom and have the instructions reread, or to hear the transcript of the testimony read back to you.

On the other hand, you are bound to accept the law of the case as it is given to you now, and after you have determined the questions of fact that you have to determine, then you will apply the law as I

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instruct you on it, and thus render a verdict based on the facts under the law. Of course, you all took your oath. There is an obligation that you would accept the law as I give it to you and apply it accordingly.

Now, you should not draw any particular inferences from any rulings or instructions of mine as to the testimony made during the trial because it is the evidence which was admitted into the trial which you consider, and not what was excluded, or not the fact that a question was asked and was upon objection held to be not admissible, or that some answer may have been given and after objection was held to be inadmissible and that it should be stricken. So you shouldn't be influenced by any of those considerations, and you shouldn't draw any inferences from the fact that a question was asked if it wasn't answered. It is the answer that counts and not the question. So, summing it up, you must decide the case solely on what we call the competent evidence, meaning, the evidence that is admissible and that has been held to be admissible.

Now, you have the right to, as I have told y to take the exhibits with you into the jury room if you wish with the one exception I mentioned, an you may let me know what your wishes are in that respect after we finish the charge.

You are to base your verdict on the evidence alone. You shouldn't be affected by sympathy or by any considerations outside of the evidence, or by what the reaction to your verdict may be, whether it might be popular or unpopular, whether it please some person or displeases some person, be it the Judge, the counsel or anyone involved in the matter or, for that matter, anyone not involved in the matter. You also should not consider any effect as to punishment of the defendant, because the question of punishment, if there should be a conviction, is for the Court, and it is not the function of the jury to take that into account.

As I have told you, the defendant is presumed to be innocent until his guilt is proven beyond a reasonable doubt. The burden of proving the defendant guilty beyond a reasonable doubt is always on the ou,

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People, and the law requires that you give him that presumption throughout the trial until the People have proven his guilt to your satisfaction beyond a reasonable doubt, if they should so prove.

Your verdict, gentlemen, has to be unanimous, whether it be guilty or innocent. Of course, if you are unable to reach a verdict, then you will report that back to me as to the fact that the jury failed to agree.

Now, your function in determining what the facts are and where the truth lies makes it necessary for you to evaluate the testimony of all of the witnesses in order to determine their credibility and the weight which you find should be given to their testimony. In weighing the credibility of the witnesses, in determining whether or not a witness is telling the truth, you have a right to apply all of the tests and all of the considerations and all of the common sense that you would ordinarily apply in your own affairs in your everyday life in judging the credibility of statements made to you and whether or not the person making those statements is telling

the truth. You may, for example, consider whether a witness has any interest in the outcome of the case. You may consider whether a witness has any bias or prejudice. You may consider the age, the appearance the demeanor, the conduct and behavior of the witness as he or she sat on the witness stand and testified. Also, you may consider the opportunities of the witness for observing the facts about which he or she testified and the probability or improbability of his or her story, taking into account all of the evidence and the facts and the circumstances proven at the trial.

Now, I will charge you concerning a rule of law which applies with respect to the testimony of any witness found by you to have testified falsely. If you find that any witness has willfully testified falsely to any material fact or issue you have the right to disregard all or any part of that witness' testimony.

I will give you a definition of reasonable doubt Reasonable doubt does not mean that the People must prove the defendant's guilt beyond all doubt but beyond

a reasonable doubt. This has been defined as the doubt of a reasonable man or woman. It does not include a mere possibility, or a doubt which is borne of a guess, or a surmise or a fancy. It is a doubt which arises from the conscientious consideration of all of the evidence, and it is often defined as an actual doubt of which you are conscious after you have gone over all the testimony in the case, have given consideration to each and every part of the evidence, and if after that consideration the presence - of certain facts or the absence of certain facts in the proof leaves your mind in a state of uncertainty so that you are not fully convinced of the defendant's guilt, and you have a doubt which seems reasonable to you, then that sort of doubt is a reasonable doubt. If that doubt exists you must give the benefit of that doubt to the defendant and acquit him. On the

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other hand, if no such reasonable doubt exists it is your equal duty to convict the defendant.

The law does not make any distinction between the degree of importance of the duty of the juror one way or the other. Thus, if you do not have a reasonable

doubt, then, you disregard everything outside the evidence, the competent evidence, and render a true verdict according to the evidence as you have taken your oath to do.

There is another rule of law which I will call your attention to in the language of the statuitself. A provision of the Code of Criminal Procedure in this state provides as follows: "The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testification of the fundamental rules which you are bound to observe.

There are two types of evidence, two classifications; direct and circumstantial. I know you have heard some discussion on this before in this case.

As a legal matter, as to accepting the evidence, the is no distinction between the two types of evidence.

A fact may be established by circumstantial evidence as sufficiently and completely as by direct evidence.

Direct evidence consists of testimony of witnesses as to what they saw, heard or felt with their senses

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in other words, their own direct senses in relation to the crime charged -- on matters which are relevant to the issues in the case.

Circumstantial evidence is evidence which may be given either by exhibits or by testimony of witnesses concerning facts which, even though found to be true, do not directly show the commission of the crime or of an element of the crime, but from which a reasonable inference may be drawn of the commission of the crime. I point out to you that before that inference is drawn that the fact from which the inference is to be drawn has to be proven by direct evidence. Now, if an inference is to be drawn to constitute circumstantial evidence and is drawn from facts which are proven, that inference can't be based on a conjecture or a speculation, but it must follow logically from the proven facts, and it must exclude to a moral certainty every other reasonable hypothesis except that of guilt. inference must not only be consistent with and point to the defendant's guilt but it must be inconsistent with his innocence. I am referring here, of course,

to the process of accepting circumstantial evidence So if the circumstances and inferences are as consistent with his innocence as with his guilt, then, you must acquit the defendant if you so find. And I point out to you I am referring here to the acceptance of circumstantial evidence.

Now, there are various counts in this indictment, as you know. Each of them charges -- "that the defendant Sebastian Rossilli, aiding and abettic and being aided and abetted by two persons to this Grand Jury unknown," committed the various crimes that are charged in each of these counts. So I shall define the terms "aiding and abetting," and you will bear in mind in your consideration of each of the counts in the indictment the fact that this is an element charged. In the sense that the words "aiding and abetting" are used in criminal law they contemplate conduct calculated to incite, encourage or assist in the perpetration of a crime. These words encompass all assistance rendered by acts or words of encouragement, incitement or support, presence being either actual or constructive. In thi case, of course, it was actual during a great part of

the incident, these acts which I have just described, which are given with the intention of rendering assistance in the perpetration of the crime. It involves some participation in the criminal act in furtherance of a common design, and it implies some conduct of an affirmative nature either before or at the time the criminal act is committed. word or act or deed is essential in establishing aiding or abetting on the part of a defendant. It does not need to contribute to the criminal result in a sense if the result would not have occurred except for the assistance given. It is enough if the assistance facilitates the result that would have taken place without it. The contention of the prosecution is that this defendant aided and abetted others or was aided and abetted by others in the commission of the crimes charged. From the definition that I have given you of aiding and abetting, the defendant would be guilty if found beyond a reasonable doubt either that he was concerned with the commission of the crime or that he aided and abetted others in the commission of the crimes charged. For example,

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this would apply to assaults committed on persons, or the other crimes charged which were committed by accomplices but in which you found, if you did so find, that the defendant aided and abetted the accomplices to commit.

Now, gentlemen, perhaps you would like to just take a moment to stretch, and we will give the reporter an opportunity to relax for a moment, and then I will continue.

(Pause.)

THE COURT: Gentlemen, the defendant has interposed a defense which is termed "alibi," that is, he maintains that at the time of the commission of the crimes charged that he, the defendant, was at anothe and different place from that at which the crimes are alleged to have been committed and, therefore, he was not and could not have been the person or one of the persons who committed these offenses. The reople, of course, contend that the defendant was at the place where the crimes were committed and actually did commit the crimes, and it is one of your duties as triers of the facts to determine where the

truth lies as between these two contentions. So you must consider all the testimony on this subject which in any way might tend to prove or disprove the contentions on the issue of alibi. In doing this you must bear in mind that the burden of proving an alibi does not rest upon the defendant since the defendant does not have under our rules any burden of establishing his defense. It is the burden of the People to prove the case against the defendant beyond a reasonable doubt, and that applies to the issue of alibi. Thus, the People have the burden to establish to your satisfaction beyond a reasonable doubt that at the time of the commission of the crime the defendant was at the crime and committed the crimes either personally or by aiding and abetting his accomplices, if you should find, of course, that he had accomplices.

So your process of deliberation is not just a matter of equating the People's witnesses and the defendant's witnesses on this issue and selecting between those two groups. Instead, since the People have the burden of proof in the first instance of

establishing the defendant's guilt beyond a reasonab doubt, as I have told you several times, you should determine whether this has been done by the testimon of the People's witnesses. I can also phrase the same question this way: Have the People sustained their burden of all elements of the case beyond a reasonable doubt? If you should find that this has been done, then, you may consider the defense of alibi, and the People have the burden of proof on this issue just as on all of the other issues. If you find that the testimony of the witnesses for the defense creates a reasonable doubt in the issue of alibi, you must acquit the defendant. not required on this issue of alibi that the People produce rebuttal witnesses after the defense witnesses have testified, however, because they may rest upon the testimony of the witnesses who had previously appeared and testified at the trial. So I charge you that if after considering all the evidence in the case you have a reasonable doubt as to whether the defendant was present at the scene of the crimes, then, you should acquit the defendant.

We will now take up the individual charges in the indictment. The first count in the indictment charges the defendant with the crime of robbery in the first degree as follows: 'The defendant Sebastian Rossilli, aiding and abetting, and being aided and abetted by two persons to this Grand Jury unknown" -- I am quoting, of course, from the indictment -- "in the County of Nassau, State of New York, on or about the 11th day of January, 1965, in the daytime of the said day, unlawfully and feloniously took certain property owned by Sydelle Marcus, having an aggregate value of about \$40,000, to wit, miscellaneous jewelry and lawful currency of the United States of America, all with a total aggregate value of about \$40,000, from the person and in the presence of Sydelle Marcus and Mary Barsh against their will by means of force and violence and fear of immediate injury to their person; the said defendant being then and there assisted by accomplices actually present, being then and there armed with a dangerous weapon, to wit, a gun, being then and there aided by the use of an automobile,"

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and that, as I told you, is taken from the indictor of course, the indictment does not constitute evid in the case but is the accusation, and that will apply as I read you additional sections. I mean, that statement concerning the indictment will apply to all of the additional sections of it that I will read to you hereafter.

Robbery is defined as an unlawful taking of personal property from the person or in the present of another against his will by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property o a relative or member of his family, or of anyone in his company at the time of the robbery. The gist of the crime of robbery is larceny by force, compulsion or fear of injury to the person from whom the property is taken. So a mere snatching from the person without such force or fear being present would not constitute robbery. In order to constitut robbery, force or fear must be employed either to obtain or retain possession of the property, or to p vent or overcome resistance to the taking, and not

simply a means of escape. So the law states that
where force is employed either to obtain or retain
possession of property from the person, or to prevent
or overcome resistance to the taking, the degree
of force that is employed is not important.

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Now, I will give you the definition of robbery rather, the elements of robbery in the first degree as it applies in the situation we have in this case. Robbery in the first degree is an unlawful taking -- and here I will stop just a moment to explain to you that we are going to have different grades of crimes charged given to you. I will explain this further to you, but I am giving you robbery in the first degree at this point, and I will come to robbery in the second degree in a few minutes. So I point this out so that you will be prepared to distinguish between the two. I will point out to you the distinguishing characteristics.

As I started to say, robbery in the first degree as it pertains to this case is an unlawful taking or compulsion of property accompanied by force or fear committed by a person who is, one, armed with

a dangerous weapon, or being aided by an accomplice who is actually present -- the accomplice must be present -- or being aided by the use of an automobi or a motor vehicle. So I charge you that you must be satisfied beyond a reasonable doubt under this count of the indictment, robbery in the first degre that there was an unlawful taking of property, that the unlawful taking was achieved by force or fear of injury upon the person from whom it was taken, that the defendant was either armed with a dangerous weapon, or if you find that he had accomplices, that his accomplices were so armed with a dangerous weapon or that he was aided by an accomplice actually present, or that he was aided by the use of an automobile or motor vehicle. If you are so satisfie beyond a reasonable doubt that there was an unlawful taking of property by the defendant by means of force or violence or fear of injury, immediate or future, to the persons of either Sydelle Marcus or Mary Barsh, and that the defendant or his accomplices were armed with a dangerous weapon, in this case a gun, or that the defendant was being aided by an

accomplice in the perpetration of the crime and the accomplice was actually present, or that the defendant was aided by the use of an automobile or motor vehicle, then your verdict may be guilty of robbery in the first degree. If you are not so satisfied beyond a reasonable doubt, then you will find the defendant not guilty of robbery in the first degree. Now, this does not necessarily mean that the defendant would be acquitted under the charge of robbery, however, because under our law a person charged with a crime may be convicted of the crime charged in the indictment or of a lesser degree of that crime if the evidence does not warrant conviction of the greater degree but does warrant conviction of the lesser degree. Thus, if you are not satisfied of the defendants guilt of robbery in the first degree beyond a reasonable doubt, then you may consider his guilt or innocence of the crime of robbery in the second degree.

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Robbery in the second degree as it would apply in this case is defined as follows: "Such unlawful taking or compulsion when accomplished by force or

fear but not under circumstances amounting to robbery in the first degree when it is accomplished either by the use of violence or by putting the person reabed in fear of immediate injury to his person or that of someone in his company." So if you are satisfied beyond a reasonable doubt that there was an unlawful taking of property accomplished by force and fear, or by the use of violence -excuse me -- accomplished by force or fear and by the use of violence, or by force and fear and putting the person from whose possession the property was taken in fear of immediate injury to her person or that of someone in her company, then, your verdict may be guilty of robbery in the second degree. will just repeat that description of robbery in the second degree: "An unlawful taking or compulsion when accomplished by force or fear but not under circumstances amounting to robbery in the first degree when accomplished by the use of violence or by putting the person robbed in fear of immediate injury to his person or that of someone in his company."

So you will note that in order to convict
a defendant of robbery in the second degree it is
not necessary to find that the defendant acted while
armed with a dangerous weapon, or that he had an
accomplice actually present, or was aided by the
use of an automobile.

If you are not satisfied beyond a reasonable doubt of the defendant's guilt of robbery in the second degree as I have explained it to you, then you would find him not guilty of that crime, and in that event you may consider the crime of robbery in the third degree. Robbery in the third degree is committed when a person robs another under circumstances not amounting to robbery in the first or second degree. So, if it has been established to your satisfaction beyond a reasonable doubt that the defendant unlawfully took property from the person or possession of Sydelle Marcus by force, compulsion or fear of immediate injury under circumstances not amounting to robbery in the first degree or second degree, you may find the defendant guilty of robbery in the third degree.

Now, I will point out to you here, gentlemen, that the question of whether the property allegedly taken amounted to \$40,000 or less than \$40,000 is not an issue in your deliberations in the matter of robbery. The actual value of the property will become an issue later on in the consideration of larceny, as I shall explain it to you. It is not a consideration which you need concern yourselves with in the determination of robbery.

The second count of the indictment charges the defendant with the crime of burglary in the second degree as follows; and I am quoting from the indictment: "The defendant Sebastian Rossilli, aidin and abetting, and being aided and abetted by two persons to this Grand Jury unknown, in the County of Nassau, State of New York, on or about the 11th day of January, 1965, in the daytime of said day, with the intent to commit therein the crime of larceny, broke and entered the dwelling house of Sydelle Marcus by artifice"-- artifice, as I am sure you know, means a trick or device which gives an impression of facts which are untrue -- "by artifice,

to wit, by pretending to deliver a package at said residence, there being therein at the time human beings."

The crime of burglary in the second degree is defined as follows: "A person who with intent to commit some crime therein breaks and enters a dwelling house of another in which there is a human being."

Thus, separating it into elements, these elements must be present. As far as breaking and entering into a building or a room or any part thereof as it pertains to this case, I charge you that obtaining entrance into the dwelling house of Sydelle Marcus by artifice, to wit, by pretending to deliver a package at the residence could constitute a breaking into the house under the law. In other words, if you found that those facts actually occurred it would be permissible for you to find that that was a breaking as defined in burglary in the second degree or burglary. The word "entering" means to make an entrance into a building or room, and you can consider that in the normal and usual sense of

the word.

Another element of the crime charged is that a human being was in the premises at the time of breaking and entering and, of course, that is a matter that you can consider in the normal interpretation of events from the evidence.

The breaking and entering must be with the intent to commit a crime in the dwelling. In this case the crime that is alleged is larceny.

So now we come to a definition of larceny.

As I have told you, it is alleged that the intent of this breaking and entering was to commit a larceny.

It is necessary that I define for you a larceny.

Now, the definition of larceny is as follows: "A person who with intent to deprive or defraud another of the use and benefit of property, or to appropriate the same to the use of the taker, or to any other person other than the true owner, who wrongfully takes, obtains or withholds by any means whatever from the possession of the true owner or of any other person any money, personal property, article of value of any kind, steals such property and is guilty of

larceny."

So as part of the proof of burglary in the second degree, whereas I have told you an element is the intent to commit a crime when committing the breaking and entering, as part of the proof in addition to proving a breaking and entering the People must prove beyond a reasonable doubt that in doing so the defendant was actuated by an intent to commit the crime of larceny therein.

So how do you establish whether intent exists or not? Intent is a mental process or a state of mind. Consequently, you can't see it, hear it or touch it. As a result, therefore, the existence or absence of specific criminal intent must be inferred from circumstances, and such circumstances as might go to determine the presence or absence of intent as a motive for committing a crime, the presence or absence of mistake, and the defendant's state of mind as shown by his conduct at the time, and all of the other facts and circumstances surrounding the alleged commission of the crime. Of course, this is all dependent upon your finding that the defendant

was at the place and did commit some of the acts charged, and, particularly, in considering the crime of larceny, that he committed a larceny, or that in considering burglary, that he had the intent to commit a larceny when he committed the acts that would constitute burglary.

So you consider the defendant's state of mind as manifested by his conduct and all of the other facts and circumstances surrounding the alleged commission of the alleged crime. You must consider and determine whether a criminal intent existed on the part of the defendant to commit the crime charged.

So if you are satisfied that he broke into the dwelling house by means of a trick or an artifice, and he entered the building while there was a human being present with the intent to commit the crime of larceny inside, your verdict may be guilty of burglary in the second degree and, conversely, if you are not so satisfied, then you would find him not guilty of this crime.

Now, the law provides that a person charged with a crime may be convicted of the crime charged

or of a lesser degree, as I explained to you a few minutes ago, if the evidence would justify conviction of the lesser degree. If you are not convinced beyond a reasonable doubt that the defendant is guilty of burglary in the second degree you may consider whether he committed the crime of unlawful entry. Unlawful entry is defined as follows: "A person who under circumstances or in the manner not amounting to a burglary enters a building, or any part thereof, with the intent to commit a crime is guilty of a misdemeanor." The distinction between burglary in the second degree and unlawful entry is that burglary in the second degree, as I have defined it, requires both breaking and entering, and unlawful entry does not require a breaking. So unlawful entry is an unauthorized entry into a building with the intent to commit a crime.

The third count of the indictment charges the defendant with the crime of grand larceny in the first degree, and now I read from the indictment again: "The defendant Sebastian Rossilli, aiding and abetting and being aided and abetted by two persons to this Grand Jury unknown, in the County of

Nassau, State of New York, on or about the 11th decomposition of January, 1965, in the daytime of the said day, with the intent to deprive and defraud the owner of the property and of the use and benefit thereof, and to appropriate the same to the use of the defendant or some other person, stole, took and carried away from the person of Sydelle Marcus certain property owned by her having an aggregate value of about \$40,000, to wit, miscellaneous jewe and lawful currency of the United States of America all of the total aggregate value of about \$40,000.

So I will define for you grand larceny in the first degree as follows: "A person is guilty of grand larceny in the first degree who steals, unlaw fully obtains or appropriates in any manner propert of the value of more than \$500." I previously defined for you what larceny is, and you can bear this in mind in considering that under the charge, of course, of grand larceny. It will be necessary for you to determine whether the People have proven beyon a reasonable doubt as far as grand larceny, first degree is concerned that the defendant stole, took as

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carried away property of the value of more than \$500, and that he did so with an intent to deprive the owner of the use and benefit of that property, and that he appropriated the same to his own use, and in this connection you have to find that the defendant had a specific intent to take the property and permanently deprive the owner of the same, and the question of proving intent arises in this connection also in considering grand larceny in the first degree. Therefore, if you find that the defendant had the specific intent to take the property and permanently deprive the owner of the same, and that the value of the property was over \$500, you may find the defendant guilty of grand larceny in the first degree under this count of the indictment. If you do not so find, or if you find that the value of the property was less than \$500, you may find him not guilty of grand larceny in the first degree.

Now, in considering the value of the articles allegedly stolen you have to consider the testimony as to the cost of the articles and as to the recovery

from the insurance company, and the description of the articles given to you by the witness. You are not bound by the testimony of the witness as to the value, but you reach your own conclusion basing it upon your appraisal of the weight and the effect of the widence and the testimony of the witness.

The same thing applies to grand larceny as applies to the charge of robbery. In other words. there are different grades of the crime, and if you find that the defendant is not guilty of grand larcen in the first degree you may then consider grand larcet g in the second degree. Grand larceny in the second degree is defined, as it applies in this case, as follows: "A person who steals or unlawfully obtains or appropriates property of the value of more than \$100 but not exceeding \$500 in any manner whatever." So the difference between grand larceny in these degrees is the difference of the value of the articles allegedly stolen. If you determine the value of the articles stolen to be less than \$500 but more than \$100, and if you find beyond a reasonable doubt that the defendant did steal such

articles, you may find him guilty of grand larceny in the second degree.

Finally, if you determine that the defendant did steal the articles, commit a larceny, but the value of the articles was less than \$100, or you are not able to find that it was more than \$100, then you may find him guilty of petit larceny. If you do not so find you would find him not guilty of petit larceny.

The fourth, the fifth, the sixth, the seventh and the eighth counts in the indictment all involve charges of assault in the second degree. The fourth and sixth counts charge that the defendant committed the crime of assault on or about January 11, 1965, aiding and abetting, or being aided and abetted by two unknown persons in that he assaulted Sydelle Marcus and Mary Barsh with the intent to commit upon them the crime and felony of grand larceny. The fourth count charges that he committed that crime against Sydelle Marcus, and the sixth count charges that he committed that crime against Mary Barsh.

The elements necessary to prove each of those counts

could be the same. I will instruct you as to tho two counts together, but each is to be considered by you separately. You should render a separate verdict on each count.

Before going into the question of the element of the crime of assault I will give you a definition a general definition of assault. An assault is defined as an unlawful attempt by one person with force or violence to inflict bodily injuries upon another without the other's consent. An assault me the performance of an intentional hostile act by one person towards another with the apparent ability to carry out the act, and such an act itself constitutes an assault whether or not it is followed by an actual battery or blows from the person assaulted Assault in the second degree as it pertains here is set forth in the Penal Law of this state as follows:

"A person who assaults another with ment to commit a felony," and, of course, you would apply that definition of assault that I have just given you. In consideration of these charges you have to bear in mind in the charge of assault in the second

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degree that the specific intent to commit a crime -the specific intent to commit a crime -- must be
proven beyond a reasonable doubt, and you must bear
in mind the definition I have already given you, as
I say, of specific intent.

So you would consider and decide the following questions on assault in the second degree: One, did the defendant assault the person named in each count. As you consider each count you will consider whether he assaulted that particular person; did he assault that person with the intent to commit a felony, specifically, robbery or grand larceny. If you are satisfied beyond a reasonable doubt that the defendant assaulted Sydelle Marcus with the intent to commit the crime and felony of robbery and grand larceny you may find him guilty of assault in the second degree on the fourth count. Likewise, if you are satisfied beyond a reasonable doubt that he assaulted Mary Barsh with the intent to commit the crime and felony of robbery and grand larceny, or either of them, you may find him guilty of assault in the second degree on the sixth count. In either case,

if you are not so satisfied, you may find him not guilty on either or both of those counts.

In the same way as we have discussed in connection with our previous discussions, there are different grades of the crime of assault, and if you find the defendant not guilty of assault in the second degree you may consider the crime of assault in the third degree. Assault in the third degree is defined as follows: "A person who commits an assault or an assault and battery commits the crime of assault in the third degree." So under the definition as I have given it to you, you may find the defendant either assaulted Sydelle Marcus or Mary Barsh, and you may find him guilty of assault in the third degree under either of the counts or on both counts, but if you are not satisfied as to his guilt beyond a reasonable doubt on that count you may find him not guilty of assault as to either or to both.

Now, as I mentioned, counts fifth, seventh and eighth of the indictment charge the defendant also with the crime of assault in the second degree in

that on January 11, 1965, with force in arms he feloniously, willfully and wrongfully did make an assault by the use of a weapon, instrument or thing likely to produce grievous bodily harm, to wit, a gun. These counts are similar, these three counts, fifth, seventh and eighth, except that each one deals with a different person as having been assaulted. The fifth count names Sydelle Marcus, the seventh count names Mary Barsh and the eighth count William Brown. As to each of these counts I ask you to remember the definition that I have given to you of assault and to bear in mind that the specific intent to commit this crime is an essential element of the crime to be proven by the People. Assault in the second degree as concerned in these counts is as follows: "A person who willfully and wrongfully assaults another by the use of a weapon or other instrument or thing likely to produce grievous bodily harm."

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So in the consideration of these last three counts, the fifth, seventh and eighth, these last three I have discussed, the elements are that at the

time and place alleged in each count the defendant assaulted the person named within the meaning of assault as I have given it to you, that he assaulted them with the the intent to inflict grievous bodily harm, that he assaulted the person with a weapon likely to produce grievous bodily harm, in this case a gun. And you may find him guilty also if you find that he aided or abetted an accomplice who committed assaults on these persons named. So if you find that the defendant assaulted the persons named -- you consider each of these counts separately of course, as it refers to the person named in the count -- if you find that the defendant assaulted the person named in the count that you are considering with the intent to inflict grievous bodily harm with a gun or an instrument likely to produce grievous bodily harm, you may find him guilty as to each count If you do not so find as to any count or all counts you may find him not guilty.

Now, in the same way, in consideration of these counts if you find that the defendant assaulted Sydelle Marcus, Mary Barsh or William Brown, or any of them,

you may find him guilty of assault in the third degree as to any of these counts, but only if you find that it is assault, an assault, but it does not have all of the elements as I have just given them to you that are necessary to constitute assault in the second degree under this count.

Now, going back for a moment, just to emphasize the difference in these counts involving assault, as I told you, the fourth count charges him with the crime of assault in the second degree, and the sixth count the same; the fourth count being against Sydelle Marcus and the sixth count against Mary Barsh, and there the charge was that there was an intent to commit a felony so as to constitute assault in the second degree. Without that intent it would not be assault in the second degree under those counts. In the fifth, seventh and eighth counts where the charge is also assault in the second degree, the intent to commit a felony is not involved, but there must be the assault with the intent to inflict grievous bodily harm with a weapon likely to produce grievous bodily harm, as charged, a gun.

Thus, gentlemen, your verdict may be one of the following on the first count of the indictment: Guilty of robbery in the first degree, or guilty of robbery in the second degree, or guilty of robbery in the third degree, or not guilty. As to the secon count of the indictment: Guilty of burglary in the second degree, or guilty of unlawful entry, or not guilty. As to the third count of the indictment: Guilty of grand larceny in the first degree, or guilty of grand larceny in the second degree, or guilty of petit larceny, or not guilty. As to the fourth count of the indictment: Guilty of assault in the second degree, or guilty of assault in the third degree, or not guilty. As to the fifth count of the indictment, the same. As to the sixth count of the indictment, the same. As to the seventh count of the indictment, the same. As to the eighth count of the indictment, the same; all having to do with assault.

Gentlemen, do you have any requests or exceptions to the charge?

MR. DOOLITTLE: I do not have an exception, your

Honor. I have what I suppose is in the form of a request. I respectfully submit that the Court charged burglary in the second degree and unlawful entry.

I request that the Court charge burglary in the third degree, too.

THE COURT: I will deny that request, Mr. Doolittle.

Any requests?

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MR. WEINBERG: No requests.

THE COURT: Any exceptions other than those otherwise taken?

MR. WEINBERG: I except to the charge with regard to the definition of reasonable doubt.

THE COURT: Gentlemen, I said I would answer the question you asked earlier in the case. The question you asked reads as follows: "Please explain the reference to Elmore as referred to by defense attorney because Juror No. 12 could not understand connection with the case in question."

Well, I answer that by saying that the question or issue to which this reference was made has in my opinion been covered in my charge. I have taken up that principle of law and covered it. This was a

reference to a particular decision which is in our books, some past decision which the person stating it intended to use as persuasive to me, I presume, in making a decision on a certain point that was under consideration at the time, and it need not be given any further consideration by you. As I state I feel that it has been covered. The point in question has been covered in my charge.

Gentlemen, you may retire for your deliberations.

Of course, you have to go to lunch. You will not discuss the case until you return to the jury room after lunch.

THE CLERK: Is the alternate juror discharged?

THE COURT: The alternate is discharged, sir,

with the thanks of the Court for your services. You

have been a most attentive juror during the course o

the trial, as has the entire jury been, and I thank

you.

Gentlemen, you may retire to the jury room.

(A luncheon recess was taken.)

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AFTERNOON SESSION

(The jury returned for their final deliberations.)

(The following ensued at approximately 3:35 p.m.:)

THE CLERK: People v. Sebastian Rossilli, Indictment No. 20991.

Roll call of jurors.

(Jury roll call taken; all present.)

THE CLERK: Gentlemen of the jury, have you reached a verdict?

THE FOREMAN: We have.

THE CLERK: The jury will rise; the defendant will rise.

Mr. Foreman, what is your verdict?

THE FOREMAN: We find the defendant guilty on all counts as charged.

THE CLERK: Gentlemen of the jury, harken to your verdict as the Court has it recorded. You find the defendant Sebastian Rossilli guilty as charged as follows: Robbery, first degree; burglary, second

degree; grand larceny, first degree; assault, secondegree, five counts; is that your verdict, so say 3 all?

(Jury indicated in the affirmative.)

THE CLERK: You may be seated.

THE COURT: Do you wish the jury polled?

MR. WEINBERG: I do, your Honor.

THE COURT: Will you please poll the jury?

THE CLERK: Mr. Foreman, harken to your verdit You say you find the defendant guilty of robbery, first degree; burglary, second degree; grand larcen first degree; assault, second degree, five counts?

THE FOREMAN: Yes.

(The remaining eleven jurors were similarly polled and responded in the affirmative.)

THE CLERK: The jury has been polled and that their verdict, your Honor.

THE COURT: Gentlemen of the jury, you have given up a week of your time to perform a function which is most necessary. You have shown your willingness to contribute to the operation of the system of justice that we have in this county, and which I think we all

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take some pride in that we try to provide the very best in the way of a fair trial for persons who are accused, and I know that you have given the case your very strict attention and have given it careful deliberation, and I thank you on behalf of the county and the County Court.

Gentlemen, you are discharged.

(The jury withdrew from the courtroom.)

THE CLERY: Will the defendant and his counsel step up here, please. I want to take the defendant's pedigree.

MR. WEINBERG: Before that, your Honor, I would like to make some motions, if I may.

THE COURT: Well, we will take the pedigree and then you can have your motions.

(Defendant sworn; pedigree taken.)

THE CLERK: Date of sentence is March 7th.

THE DEFENDANT: You framed me. You framed me.
You and everybody else framed me.

MRS. ROSSILLI: He is not guilty, your Honor. He was home that day.

THE DEFENDANT: I am framed if I ever saw one;

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THE COURT: Mr. Weinberg, do you want to speato your client?

MRS. ROSSILLI: He was home that morning. It very hard for him to --

THE DEFENDANT: He can't look at me. He fram me so long, that man. You beat me for two days.

You framed me. That's why you couldn't look me in the eye. You framed me.

THE COURT: All right. I have given you a charto express yourself.

THE DEFENDANT: Express myself, your Honor?

THE COURT: Just aminute. I can understand how you feel.

THE DEFENDANT: The evidence wasn't brought this courtroom that this man framed me for two solid days. I took the lie-detector test and every thing and that's how bad he framed me. This man, to can't look at me and deny it. He can't look at me and tell me. He didn't deny it.

THE COURT: Mr. Rossilli, your attorney has some motions to make.

THE DEFENDANT: Motions? This is not -- what motions? This is and out-and-out frame-up, this is. Where is the witnesses to point at me?

THE COURT: Do you want an adjournment to make your motions?

MR.WEINBERG: No, your Honor, I would like to make my motions now, if I may.

THE COURT: All right.

MR. WEINBERG: Your Honor, I move at this time to set aside the verdict as against the weight of the credible evidence, and at this time I would renew solely for the purposes of the record my previous applications which were, one, that this Court erred in making its determination that due diligence was employed by the office of the District Attorney in attempting to ascertain the whereabouts of William Brown, and the said hearing clearly indicated that there were no efforts other than telephone calls for a period of six months to ascertain the whereabouts of William Brown, that the first time that the

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produced upon the trial of this action was on the eve of trial, the very day of trial when Mr. Doolittle told me that he was unable to procure Mr. William Brown. I further submit that such due diligence was not shown, particularly in the circumstances of this case where William Brown's testimony was the fulcrum about which the entire case centered.

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THE COURT: Well, I don't think it is necessary to argue the motion.

MR. WEINBERG: I just want to say one more sentence, and I am finished with that.

THE COURT: All right, go ahead.

MR. WEINBERG: Particularly in view of the fact that not one witness at the situs of the crime was able to identify this defendant other than two boys who did not see this defendant leave the situs of the crime.

I now further move, your Honor, that the summation of the District Attorney was clearly and patently prejudicial to the rights of this defendant in that he commingled the burden of proof in telling them how

they had to apply it and what the standards are in order to find a conviction, and that no matter how clear and lucid your Honor's instructions to the jury are, your Honor, the jury weighed witness against witness, as the District Attorney stated, alone should warrant a reversal. Moreover, I should like to cite to this Court the case of People v. Taranton, 275 Appellate Division 1061, wherein the Appellate Division, Second Department, had the judgment of the County Court, Nassau County, convicting the appellant as a prior felony offender of robbery in the first degree, burn ary in the second degree and assault in the second degree, two counts, and imposing sentence thereon reversed on the law and the facts, the indictment dismissed and the defendant discharged, all identical as the charges in this case. There the Appellate Division held there was insufficient evidence of identification of appellant to permit a finding that he was present near the scene of the crimes, and there is no other evidence of aiding and abetting or participating therein. Clearly in this case the sole testimony upon which this defendant was

found guilty is the fleeting seconds wherein two boy without description, without anything other than the fact that they recognized a man because he had black hair or was short, found that this man was running down the street, and, further, the testimony of a man who is not here to confront the jury, and was afraid of law-enforcement agencies at his cross-examination at a felony court hearing introduced, which was the gravamen of the determination of the jury.

THE COURT: It is my recollection, just as an observation, that the first conference that was had on the question of whether the witness Brown wou be produced by the People was on a Monday in chamber when you and Mr. Doolittle sat in with me, and we discussed it at that time.

MR. WEINBERG: That was the first time that I knew that the witness Brown would not be produced.

THE COURT: So I point that out that that was the day before the trial started; is that right?

MR. WEINBERG: That is correct, your Honor.

I think I said "the eve of trial," your Honor. I

meant that I believe it was Monday of this week.

THE COURT: And also, just on your recollection of the facts, I think you made an understandably overly strong statement as to the identification by the two boys. Each of them said that they saw his face, and they identified him. I am just pointing that out to you. I don't want to go into a discussion of the facts at this time.

I will deny your motions.

MR. WEINBERG: Respectfully except.

THE DEFENDANT: Denied denied, denied.

Can I say something, your Honor?

THE COURT: No.

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THE DEFENDANT: I can't? There is five people that know I didn't commit this crime; me, my wife, my mother-in-law, this man and this man (indicating). They framed me. Look at me, you liar. You framed me. You beat me two days.

MRS. ROSSILLI: Your Honor, may I say something to you? My husband was home that day. It is very hard for anybody to believe that he was home that whole day.

THE COURT: All right; that's all.

Witness	Direct	Cross	Redirect
Sydelle Marcus	123	151	
Brian Barto	159	164	100
John Friei	198		
John Patrick Swift	205	219	
William Henderson	235	240	247
Lois Freilish	243	245	
Crace Perratto	248	258	274
Marie Rossilli	275	282	

CERTIFICATION:

I hereby certify the foregoing is a true and accurate transcript.

MISSAU IMPEY # 246/8 18_

MAR 3 1 1967

FRANKLIN H. OKHSTEIN COUNTY CLERK, NASSAU COUNTY